

# **Exhibit O**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 3

- - - - - X

M WAIKIKI LLC,

Plaintiff,

- against -

INDEX NO.  
651457/11

MARRIOTT HOTEL SERVICES, INC.,  
I.S. INTERNATIONAL, LLC and IAN SCHRAGER,

Defendant.

- - - - - X

MARRIOTT HOTEL SERVICES, INC.,

Counterclaim-Plaintiff,

- against -

M WAIKIKI LLC,

Counterclaim-Defendant.

- - - - - X

60 Centre Street  
New York, New York  
August 30, 2011  
PROCEEDINGS

BEFORE:

HONORABLE EILEEN BRANSTEN,  
Justice

APPEARANCES:

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Attorneys for the Plaintiff  
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New York, New York 10153  
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Appearances - continued

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- and -

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BY: ROBERT A. WEINER, ESQ.

Bonnie Piccirillo  
Official Court Reporter

## Proceedings

THE COURT: All right, for the plaintiff, we have from Bickel & Brewer, we have Mr. Widell.

MR. WIDELL: That would be me.

THE COURT: We also have Mr. Sambhwani.

MR. SAMBHWANI: Yes, your Honor.

THE COURT: And then we have Mr. Renard.

MR. RENARD: Yes, your Honor.

THE COURT: And then for the defendant, Marriott, and also counter-plaintiff, we have Mr. DeSanctis.

MR. DeSANCTIS: Michael DeSanctis.

THE COURT: Mr. Fischer.

MR. FISCHER: Brian Fischer, your Honor.

THE COURT: Mr. Handzo.

MR. HANDZO: Handzo, thank you, your Honor.

THE COURT: And, also, for defendants International LLC and Ian Schrager, and so we have Mr. Weiner?

MR. WEINER: Right.

THE COURT: This is, basically, I believe -- and I can't say that I have read the papers with care. I really have not. But my understanding is that this is a motion by the defendants, Marriott Hotel Service for injunctive relief to stop what I believe -- if I understand this right -- to stop the

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2 Waikiki LLC, which I think belongs to a hotel, Waikiki  
3 Hotel -- I don't know why I think that, I'll give you a  
4 reason why in a minute -- from terminating Marriott  
5 Services Incorporated from terminating them and  
6 terminating their ability to, I believe, sell condos.

7 Do I have it right?

8 MR. HANDZO: Well, you're getting there, but  
9 let me if I may explain a little bit. First of all,  
10 for the record, I'm David Handzo.

11 Basically, your Honor --

12 THE COURT: You can sit down.

13 MR. HANDZO: If I may?

14 THE COURT: Sure, please.

15 MR. HANDZO: The situation here, your Honor,  
16 is that the plaintiff, M Waikiki, owns a hotel in  
17 Waikiki. However, it does not operate the hotel. As  
18 is common in the hotel industry, they hire a manager to  
19 come in and operate the hotel for them; and in that  
20 case that manager is my client, Marriott.

21 And we are here because at 2:00 a.m., Sunday  
22 morning, just a little over 48 hours ago, plaintiff and  
23 now counter-defendants, M Waikiki, showed up at the  
24 hotel operated by Marriott and evicted Marriott from  
25 the hotel; and we are asking for a TRO restraining  
26 order to remedy that.

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While Waikiki owns the hotel, Marriott has a 30-year plus extensions contract to operate the hotel, which still has 29-years plus extensions to go. And pursuant to that contract, the Marriott personnel are in the hotel, returning the hotel. They run the reservations, the guests, they do everything. Until two o'clock in the morning on Sunday when M Waikiki showed up at two a.m. and kicked all the Marriott people out.

THE COURT: Just to get my little sense of perspective, Waikiki is what, about 12 hours ahead of us or how many hours ahead of us?

MR. DeSANCTIS: Six behind us.

MR. WEINER: Behind.

THE COURT: Six behind, is that all? Because isn't it -- no three to California and three more. Six behind. So if it's two o'clock our time --

MR. HANDZO: Two o'clock in Hawaii.

THE COURT: Okay.

MR. HANDZO: So they showed up in what was the middle of the night for Hawaii.

THE COURT: Okay.

MR. HANDZO: And they, basically, took over the hotel through a combination of force, stealth and subterfuge. They showed up in the middle of the night

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1  
2 with approximately fifty security guards. They  
3 apparently had previously co-opted Marriott's head of  
4 security who, uncharacteristically, arranged for  
5 himself to be on duty that night and promptly turned  
6 over all the keys and misrepresented to other Marriott  
7 personnel that M Waikiki had a court order authorizing  
8 this  
9 takeover when, in fact, of course, they did not.

10 And so, essentially, they show up with all of  
11 these security people, middle of the night, kick  
12 everybody out; and they take over and they install a  
13 new management company called Aqua Hotel and Resorts.

14 Now, in doing that, M Waikiki has flagrantly  
15 breached its long-term contract with Marriott to  
16 operate the hotel. But, in addition to that, they have  
17 misappropriated Marriott's proprietary information.  
18 They have damaged Marriott's reputation with its  
19 guests, travel agents and group planners.

20 They are threatening an investment of hundreds  
21 of millions of dollars that Marriott has made to  
22 develop a new brand of hotels, and they have left  
23 Marriott with only the recourse of a claim for damages  
24 which to a large degree cannot be calculated; but to  
25 the extent that they can be calculated, it seems pretty  
26 clear that M Waikiki doesn't have the wherewithal to

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pay.

And M Waikiki did all of this in a really obvious quite calculated and preplanned effort to circumvent this Court and the legal process that has been initiated here by M Waikiki itself.

Back in May, M Waikiki filed a complaint with this Court; and in that complaint, they asked this Court to determine that M Waikiki had grounds to terminate the Management Agreement with Marriott.

So now we've got the complaint where they are asking this Court to decide whether it can be terminated. While it's going on, Marriott is in position of running the hotel. And now Sunday, in the middle of the night, they show up effectively through self-help, give themselves the remedy that they were asking for, for this Court before Marriott could defend itself in this court, before this Court could decide whether there's any grounds to terminate the agreement.

Now, obviously, if there had been some emergency, M Waikiki could have come to this Court, and they could have asked this Court for preliminary relief requiring Marriott to leave, giving them the property and allowing them to install a new operator. But, they didn't do that.

I would submit to you that they did not do



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1  
2 that because they knew perfectly well if they came here  
3 and asked for that, they would lose. They knew they'd  
4 have no basis to terminate the Management Agreement.  
5 They knew that they would not be able to show  
6 irreparable harm.

7 There was no emergency that required this.  
8 They just I think saw the handwriting on the wall on  
9 the motion to dismiss and decided to take matters in  
10 their own hands to get through extrajudicial means what  
11 they had originally filed this complaint to do. They  
12 had no grounds to short circuit the litigation process  
13 and terminate the Management Agreement before this  
14 Court had an opportunity to consider whether there was  
15 legal grounds to do so.

16 THE COURT: Not to interrupt, but could you  
17 let me know, the motion to dismiss is exactly where?  
18 Is it submitted?

19 MR. HANDZO: No, your Honor. We had filed our  
20 papers. I believe then Waikiki asked for an extension  
21 of time to submit theirs and they have not submitted  
22 theirs, yet. I don't recall the date.

23 THE COURT: Done by notice of motion, and it's  
24 downstairs?

25 MR. HANDZO: I believe so, your Honor.

26 Now, we're, basically, asking for immediate

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preliminary and permanent injunctive relief to prevent Waikiki from reaping the benefits of this course of conduct, to Marriott's irreparable injury.

Now, let me give you a little more background. This is a hotel that was renovated recently, extensive renovations, and reopened in late 2010. And Waikiki, when it reopened or actually prior to it reopening, entered into a contract with Marriott to manage it.

And, generally speaking, Marriott does not own the hotels. Marriott just operates as manager for other people who own it.

When the hotel was reopened with Marriott as the manager, it was reopened as a new brand of hotel that Marriott just created, called the Edition brand. The Edition brand was created by Marriott in late 2008 to compete with upscale boutique hotels like the W Hotels, which the Court might be familiar with. And Waikiki Hotel was the first Edition branded hotel to the open; and it was the first Edition brand of hotel to open because the owners of the Waikiki property wanted to be the first.

So, the hotel opens in late 2010. It's been opened for less than a year, and Waikiki is unhappy with the financial results; and it claims that Marriott has not done enough to develop the Edition brand of

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hotels; and that's basically the reason for their lawsuit.

So they filed a lawsuit here. They asked for damages, and they asked for a judicial declaration that a material event of default had occurred under the Management Agreement entitling Waikiki to terminate the Management Agreement. They did not ask for any preliminary injunctive relief to evict Marriott from the property.

So after the lawsuit was filed, Marriott continued to operate the property business as usual. As I said before, Marriott has filed a motion to dismiss the complaint, which is still pending, and that's how things stood until Sunday at two a.m. when representatives of Waikiki and representatives of a brand new management company called Aqua Hotels and Resorts, a competitor of Marriott, and cadres of security guards, about fifty in all, showed up at the hotel and took over.

When Marriott employees showed up the next morning for work, they were told to sign up with this new management company, Aqua, or they would be fired.

Now, these are Marriott employees. So Aqua and Waikiki had no business telling them that they would be fired. They are our employees; but,

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1  
2 nevertheless, that's what the employees were told in  
3 order to get them to sign on with the new management  
4 company. Aqua and Waikiki took the keys away from  
5 Marriott employees. They began changing the hotel  
6 logo. Took down the logo on the bathrobes.

7 They immediately commenced accessing  
8 Marriott's proprietary software, proprietary guest  
9 lists, confidential information all of which resides in  
10 the hotel. They began printing out information from  
11 Marriott's computers in the hotel.

12 It is clear to us that this event was long in  
13 the plan. You don't just go out and hire a new  
14 management company on the spur of the moment. That  
15 takes some time. And we, also, are now sort of piecing  
16 this together and realizing that a month or two ago,  
17 the owner asked to send representatives of Bickel &  
18 Brewer to the property to look through the records of  
19 the property in what now seems to us in an attempt to  
20 get their hands on information, which would assist them  
21 in taking over.

22 So, the last month, as a matter of fact  
23 settlement discussions with the plaintiff, thinking we  
24 were having settlement negotiations when in fact  
25 Waikiki was planning an evasion.

26 Now, the purported justification for this

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surprise two a.m. attack according to letters that Waikiki sent to us on Sunday, was that Waikiki has a purported common-law right to terminate the Management Agreement at whit.

The letter that Waikiki sent to Marriott's president claims that Waikiki, quote, "Pursuant to its common-law rights and powers, hereby terminates the above-referenced Management Agreement and its principal agent relationship with manager effective immediately," unquote.

Now, that's nonsense. There is no such common-law rights. There is no such agency relationship. M Waikiki has no common-law right to terminate.

Now they have filed papers recently, and I only had a chance to skim them. But it appears to me that they're principally hanging their defense on our request for injunctive relief on the notion, yes, indeed, they do have an agency relationship and, therefore, a common-law right to terminate.

THE COURT: Don't you have a contract with them?

MR. HANDZO: We do, exactly.

THE COURT: Where is that contract?

MR. HANDZO: The contract, I believe, was

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attached to our pleadings.

MR. FISCHER: Your Honor, it's exhibit A to the counterclaim complaint.

THE COURT: To the complaint. And is there a termination clause?

MR. HANDZO: Nothing that applies here. Basically, there's a couple of ways that they can terminate under the contract. But, first of all, let me just say, the fact they are now saying we have a common-law right to terminate, I think is a tacit admission that they agree they don't have any right under the contract.

Just to give the Court the background. The contract has a performance, financial performance test that Marriott has to meet; but that test doesn't kick in for five years. So recognition of the fact the hotel just opened in late 2010, it takes a while for business to ramp up. So Marriott in the contract agreed there would be financial performance tests they would have to meet or Waikiki, if Marriott did not meet those tests, would have a right to terminate. But that test doesn't kick in for at least another four years, so they clearly have no right there.

The other right they might have is they can claim that there was even a material event of default,

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1  
2 and they have alleged that in their complaint in this  
3 case. But the Management Agreement also says that  
4 where they allege material event of default and  
5 Marriott defeats it, which it does, then there can be  
6 no determination until a Court has resolved that  
7 dispute. So they can't just declare a default and  
8 terminate. It has to be resolved by the Court which,  
9 obviously, has to happen.

10 So, they just don't have any contractual right  
11 at this point to terminate, which is why they're coming  
12 up with this so-called common-law duty. And,  
13 basically, what that argument is, is an argument that  
14 Marriott, as the operator of the property, is their  
15 agent and, therefore, there's a principal agent  
16 relationship and you can always terminate a principal  
17 agent relationship.

18 The problem with that argument is that the  
19 Management Agreement that the parties signed expressly  
20 disclaims any agency relationship.

21 Section 11.03 of the Management Agreement  
22 states, quote, "Neither this agreement nor any  
23 agreements, instruments, documents, or transactions  
24 contemplated hereby shall in any respect be  
25 interpreted, deemed or construed as making manager a  
26 partner, joint venturer with, or agent of, owner."

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So, we've expressly disclaimed any agency relationship; and beyond that, the Management Agreement goes on to say, quote, "Owner and manager agree that neither party will make any contrary assertion, claim or counterclaim in any action, suit, expert resolution proceeding pursuant to Section 11.20, arbitration or other legal proceedings involving owner and manager."

So here they are having agreed there's no agency relationship, having expressly agreed that that they won't argue that there is; and now here they are in this Court arguing that there's an agency relationship, and that's their basis for midnight raid.

If the agreement isn't enough, this exact issue was litigated before Justice Kapnick of this court just last year. In a case called Madison 92nd Street Associates versus Courtyard Management Corporation -- and I can provide the Court with a courtesy copy of that if you'd like -- but, basically, another Marriott Management Agreement. So as you might expect, it was almost identical language to the ones I just quoted here, and Justice Kapnick found that no, there's no agency relationship; and, therefore, no fiduciary duty.

One of the arguments that I understand and Waikiki to be making in its papers that are just filed



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2 is, well, you have to look beyond the language of the  
3 contract and the actual functioning of the relationship  
4 between the parties.

5 In fact, Justice Kapnick considered exactly  
6 that argument in the Madison 92nd Street Associates  
7 case and rejected it. What she said was, I've looked  
8 at the contract. It's absolutely clear. You have  
9 sophisticated parties who negotiated it. They should  
10 be held to their bargain.

11 I should also say that the cases that Waikiki  
12 relies on to claim that there's an agency relationship  
13 are all quite old. They're all from the nineties; and  
14 every single one of them, the Management Agreement at  
15 issue in those cases expressly said that there was an  
16 agency relationship. So the Management Agreement in  
17 all of those cases were exactly the opposite of the  
18 Management Agreement in our cases.

19 In fact, what happened was, that line of cases  
20 was decided twenty years ago. Management companies  
21 started changing the contracts and the cases all now go  
22 the other way. So those cases are outdated and the  
23 facts are totally different.

24 So lack of any contractual basis to terminate  
25 Marriott, lacking any common-law right to terminate  
26 Marriott; Waikiki went and did it anyway in the most

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1  
2 practical, real world sense. They are preventing  
3 Marriott from operating the hotel by bringing in a  
4 different operator, supported by a whole cadres of  
5 security guards to make sure that the new manager,  
6 Aqua, is in and Marriott is out.

7 So, we think there is no doubt that we have  
8 shown a likelihood of success on the merits here. I  
9 also want to talk about the damages, the irreparable  
10 harm Marriott is suffering from this situation; and I  
11 want to start with the damage to the Edition brand.

12 Remember, this is a new brand. Marriott just  
13 started this brand a couple of years ago, and it wanted  
14 to compete with boutique hotels.

15 Now, as I said, Marriott generally speaking  
16 does not own the hotel. So you're going to create a  
17 new brand, what they have got to do is go out and find  
18 owners of hotels who want to either build a new hotel  
19 and brand it as an Edition property; or want to  
20 renovate an old hotel and brand it as an Edition  
21 property. But you've got to do deals with other owners  
22 to make this happen.

23 THE COURT: What makes the Edition hotel  
24 different from the regular hotel?

25 MR. HANDZO: Your Honor, there's a whole  
26 series of Marriott brands, sort of top of the line is

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2 Ritz Carlton, which is most luxurious. JW Marriott is  
3 the next. I think the notion of Edition was to have  
4 the level of luxury that you generally get at a Ritz  
5 Carlton, but more informal, and with each one being  
6 different which actually where Mr. Weiner's client  
7 comes in.

8 Ian Schrager is sort of the artistic genius of  
9 the hotel industry who partnered with Marriott to  
10 create these properties, each would be very distinctive  
11 and very sort of cutting edge. In fact, this hotel,  
12 the Waikiki property, has gotten rave reviews from the  
13 media once it opened. So, that was the notion. We're  
14 going to create this new brand. It's going to be  
15 luxurious, but it's going to be different from the top  
16 of the line Ritz Carlton in that way.

17 As I said, what you've got to do is you've got  
18 to deals with other owners to create that brand. Now  
19 you can imagine, Judge, how hard it is going to be to  
20 persuade other hotel owners to invest in a new Edition  
21 brand hotel when Waikiki has just forcibly terminated  
22 Marriott from operating the first Edition hotel. And  
23 Waikiki not only took that dramatic step in the middle  
24 of the night, it then issued a press release, which was  
25 saying things like, quote, "The owner believes that  
26 Marriott has failed in its management of this resort as

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1  
2 well as the delivery of the Edition brand concept,"  
3 unquote.

4 And that press release then quoted Waikiki  
5 lawyers, as saying, quote, "As a result, our clients  
6 brought in new management in the belief that doing so  
7 would better protect their investment," unquote.

8 Now, if Waikiki's actions are permitted to  
9 stand here, other owners will assume that the eviction  
10 was justified, that the allegations are correct, and it  
11 is going to be immensely hard to persuade other owners  
12 to invest in other new Edition hotels; and we will have  
13 a very difficult time ever proving why it was that  
14 certain deals failed. They'll know why we didn't get  
15 the deals done; but the why, will be very hard to prove  
16 so we'll never be able to quantify those damages.

17 But to make matters even worse, I told you at  
18 the outset, Judge, generally speaking, Marriott does  
19 not own hotels and that is generally true. But in  
20 order to try and get this brand going, Marriott made an  
21 exception. It bought two hotels. One in South Beach,  
22 Florida, and one in London and it is --

23 THE COURT: Where?

24 MR. HANDZO: In London. And it is pouring  
25 \$400 million into renovating these two new hotels as  
26 Edition brand hotels in an effort to get this brand

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going.

Waikiki's actions, which undercut the Edition brand, will have a serious adverse impact on this investment. I mean, basically, Judge, through its actions Sunday morning and the press releases, Waikiki has done everything it can to say to the world that nobody should invest in this brand; and if Waikiki's actions are not reversed, the world is going to assume that those allegations are correct even though Marriott has not had the opportunity to defend itself against those allegations in this Court, and this Court has not had the opportunity to decide whether those allegations have merit, which they don't.

Now, in addition to the irreparable injury to the brand, Waikiki has now also misappropriated Marriott's confidential and proprietary information. When they took over the hotel, they took over all the documents, all the computers, everything that was there. They didn't allow anybody to leave and take anything with them. In fact, they made sure they prevented anybody from carrying a laptop out or anything else.

Not only does Waikiki now have all that proprietary information, but a competing hotel company, Aqua, now also has that information and here's what

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they got among other things. They brought laptops to the hotel Sunday morning, and immediately began getting into Marriott's servers to download information onto the laptops they have brought with them, tried to access Marriott's confidential and proprietary systems.

They now have access to all of our employee personnel files, which contain employees salaries, Social Security, private family and beneficiary information, medical history, the whole nine yards and these are Marriott's employees. Not theirs.

They have Marriott's standard operating procedures and other business processes, which contain operational strategy and trade secrets. They have proprietary information about Edition's brand strategy for operation, marketing and developing. They have Marriott's confidential guest lists and customer information.

They even have access to attorney-client privileged communications between lawyers and the Marriott personnel on the property who were involved in this lawsuit.

Now, Waikiki cannot possibly claim that that information is not proprietary and confidential; because, among other things, in the Management Agreement they expressly agreed that it is. Twice, in

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fact.

In Section 11.09 of the Agreement --

THE COURT: What's the page number on that?

MR. FISCHER: 47, your Honor.

THE COURT: Okay. 09, confidentiality, is that what you're talking about?

MR. HANDZO: Yes. I don't have it in front of me, but I think it's close to the bottom of that section.

THE COURT: No, it's in the middle. 11.09, small paragraph in the middle of the page, or the top of the page.

MR. HANDZO: But it says the "Competitive information regarding brands, customers, marketing, operating and other strategies is confidential and proprietary to the manager -- that's Marriott -- and shall not be disclosed to owner,". That's Waikiki. While they have just helped themselves to all of that, and a little down further in the agreement --

THE COURT: Excuse me a second. Let me just read that.

Yes, it's the last sentence of that paragraph.

MR. HANDZO: Right, right.

THE COURT: Go ahead.

MR. HANDZO: And then I think a few paragraphs

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later, your Honor, you have Section 11.12(C).

MR. WEINER: Page 51.

MR. HANDZO: In which Waikiki agreed that it had no rights to Marriott's intellectual property and would not disclose it to third parties.

And later on in the Agreement, your Honor, there's a definition of intellectual property, which includes all software including data and information stored on it, all manuals and policies used in the operation of the hotel, customer information, and all other trade secret information such as sales and marketing plans.

It is precisely that information that they agreed is confidential that now sits in the hands of Waikiki and Marriott's competitor, Aqua.

Now that information is not just proprietary in some technical sense. It's really actually quite critical to Marriott's business; because since Marriott doesn't own hotels, it's not a company that owns bricks and mortar. What it owns is its brands, its reputation, and its intellectual property. Those are its assets, and that's what they're taking.

We have an affidavit of Ken Rehmann submitted with our you papers, your Honor, that kind of explains all of that and, basically, points out that Marriott



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has been running hotels, lots of hotels, for a long time. Over that time, it has developed very detailed standards of procedures that govern every aspect of how you successfully operate a hotel, particularly a luxury hotel. Operations, guest services, human resources, financial controls, revenue forecasting, everything.

Everything that Marriott has been doing successfully, is embodied in those standard operating procedures. It is a very valuable asset, and they just took it.

Now, M Waikiki did send us a letter on Sunday saying, well, we're willing to discuss how we can give you your proprietary information back to you; but I would submit to the Court that at some point, if too much time passes, you can't unring the bell. It doesn't help to get our standard operating procedures back after our competitors have had lots of time to study and learn them.

The more time they have, and the more people who have had the opportunity to review confidential information, the more irreparable the harm becomes.

And I have to say, I mean, somebody comes and steals your property, you shouldn't have to negotiate about the return. Especially, for the periods they are using it in the interim; and it certainly appears to us

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that they are contacting our customers, for example.

The remedy is to require Waikiki to turn the property back to Marriott and require Aqua to leave and require Aqua to return any proprietary information that they have.

The irreparable injury doesn't even end there, because there's also damage to Marriott's customer relationships. When customers come to a Marriott branded hotel, they hold Marriott responsible for the experience. And that's especially true with groups. Most hotels depend on having group business to make money so, you know, some organization wants to have their annual meeting, they took a lot of rooms at the property and there are group planners who organized that.

Those people are very risk adverse. If they tell their group we're going to this hotel operated by Marriott and it doesn't happen, the group planner is in trouble. And the next time around the group planner is going to go to the Hilton or the Four Seasons and not to Marriott.

The problem is nobody knows who owns this hotel. They just know that Marriott operates it. They thought were coming to a Marriott hotel. Now they're not. And that's not just going to hurt just this

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1  
2 hotel. That hurts Marriott, in general, because again,  
3 they wind up not going to other Marriott branded  
4 properties.

5 And last, your Honor, but certainly not least,  
6 with respect to irreparable injury, Waikiki appears  
7 unable to pay a damages judgment even to the extent  
8 that there are damages that can be quantified. As I  
9 said before, we don't think that the injuries to  
10 reputation, to brand, to the loss of proprietary  
11 information, we don't think those are quantifiable in  
12 damages in any truly reliable way; but some damages  
13 actually can be quantified.

14 Waikiki has purported to terminate the  
15 Management Agreement; and if that stands, Marriott will  
16 lose a more than 30-year stream of revenues from the  
17 management fees that it earns under those agreements.  
18 And we believe actually that the present value of that  
19 stream of revenues exceeds \$60 million, and that  
20 appears in the affidavit of Cathy Young, which we've  
21 attached to our papers.

22 THE COURT: 60 million over a term of the  
23 thirty years?

24 MR. HANDZO: It is over the term of  
25 thirty years, but there is also renewals, your Honor;  
26 and the renewals are automatic and that's then, so it's

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that revenue stream, which I believe extends beyond 30 years, and it's discounted back to present value.

So it's 60 million dollars and for the reasons we set forth in the affidavit of Mr. Rehmann, we don't believe that Waikiki would have the ability to satisfy a judgment like that. Especially because for most of this year, Waikiki has failed and refused to provide working capital for the hotel.

Marriott, instead, has been funding the operations of the hotel out of its own pocket, even though the Management Agreement requires Waikiki. So in effect, Marriott has been loaning money to the hotel to fund operations; and as of now, Waikiki owes Marriott over \$5 million for that.

So it appears that, first of all, they could not possibly satisfy a judgment. They don't appear to be paying now, and looks like their plan is, in effect, to take over the hotel, get what they want and leave Marriott holding the bag; because Marriott is not ever likely to recover the damages that it would suffer even to the extent that those can be quantified.

By the way, there's actually one thing on the legality of the termination that I should have mentioned, but I apologize I neglected it. There's actually another provision of the Agreement, Section

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1  
2 2.03, which says that even if they have a right to  
3 terminate, they cannot terminate so long as there are  
4 outstanding loans that they owe to Marriott. Right now  
5 they owe us \$5 million. Again, that's in one of the  
6 affidavits. I believe it's Mr. Rehmann.

7 So even if they had some rights, they can't  
8 terminate because they owe us money; but I'm not sure  
9 you even get there, because they just don't have the  
10 right.

11 The bottom line, your Honor, is that there is  
12 a tremendous amount of irreparable injury here.

13 So the last thing I want to address is the  
14 equities of this situation. We're asking for an  
15 equitable remedy, and the equities here to not favor  
16 Waikiki. Waikiki created the situation that we are in  
17 today and made a very purposeful, planned and really  
18 quite cynical way. It purposely did an end run around  
19 this Court to get what it is not legally entitled to.

20 And if the Court restores us to the situation  
21 that existed at 1:00 a.m. on Sunday morning, all that  
22 happens is that Waikiki has to allow Marriott to  
23 perform the contract that Waikiki voluntarily and  
24 knowingly executed. There's no harm to them in that.

25 Now, I expect Mr. Renard to stand up and  
26 protest, well, the hotel was losing money. Right now

## Proceedings

1  
2 it is; but it opened less than a year ago, and it takes  
3 time for a hotel to ramp up. Especially, a luxury  
4 hotel in this economy.

5 But, in any event, as I mentioned before,  
6 Waikiki bargained for a financial performance test in  
7 the Management Agreement with Marriott. Waikiki agreed  
8 in the contract that it would have the right to  
9 terminate Marriott if Marriott did not meet certain  
10 financial performance tests; but it also agreed that  
11 those performance tests would not kick in until five  
12 years after the hotel opened.

13 And, again, that's a recognition of how long  
14 it takes to build up a business.

15 So, now despite having bargained for a  
16 specific performance test that becomes enforceable at a  
17 specific time, Waikiki is saying that it is justified  
18 in essentially rewriting the contract to apply a  
19 different test at a much earlier time, contrary to what  
20 the parties actually bargained for. That is hardly an  
21 argument that can tilt the equities in M Waikiki's  
22 favor.

23 Lastly, your Honor, I think when you think  
24 about the equities in this case, I would respectfully  
25 submit that you might ask yourself why did Waikiki do  
26 what it did? Why not instead come to this Court and

## Proceedings

ask for relief if Waikiki really and truly believed that they are legally entitled?

THE COURT: That's a good question, and I'm going to allow Waikiki to answer.

MR. HANDZO: Okay.

THE COURT: I do have to cautious on time.

MR. HANDZO: Your Honor, one last thing, and this is, obviously, we've asked the Court for specific relief that would require essentially Marriott to operate the property pursuant to its contract.

Strictly as an alternative, and this would not remedy the situation; but if we were not returned the property, at a minimum we would argue that Waikiki would have to post a very substantial bond.

In effect, what they did was come in here themselves, a preliminary injunction which would ordinarily require a posting of the bond, and would have to be substantial because our damages are very substantially.

Having said, the real remedy here is to put us back to where we were at one in the morning on Sunday. Unless the Court has questions for me, I will turn it over to Mr. Reason.

THE COURT: Yes, thank you very much.

Go ahead, Mr. Renard.

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MR. RENARD: Thank you, your Honor.

THE COURT: Mr. Renard, do we have a contract here? What happened to the contract that was signed by both sides as Exhibit A? Management Agreement, by and between Marriott Hotel Services, Inc. and M Waikiki LLC dated July 9, 2008, and signed by Waikiki and Marriott?

MR. RENARD: Yes, your Honor.

THE COURT: What happened to that contract?

MR. RENARD: Your Honor, that contract created an agency relationship between --

THE COURT: Well, I don't know about that. I mean, that's your theory.

MR. RENARD: Yes.

THE COURT: I don't see any language in here. Point it out to me where you're entering into an agency relationship.

MR. RENARD: Your Honor --

THE COURT: That you can undo at your whim, because it's an agency.

MR. RENARD: Yes, your Honor. Well, if I may and, your Honor, following the conference with the Law Clerk yesterday, I immediately started to work on this brief that we submitted to the Court this afternoon from about four in the afternoon to about two in the morning, and I caught the first flight out so I could



## Proceedings

get to the court.

Your Honor, if I may preface this, because I think it's important. For about twenty years, I've been working in the vineyard, among other areas of the law, of hotel management agreements.

THE COURT: You have to speak up.

MR. RENARD: I've been working, your Honor, the past twenty years in the vineyard of hotel management agreements. And, your Honor, the fact of the matter is -- and I'll be glad to point out to the Court the various provisions. In fact, we do so in our brief.

But, what else do we call it when we give to another the power and authority to enter into contracts on our behalf, to purchase goods and services using our credit and our money, to write checks on accounts that contain our funds, to book business and make reservations on our behalf, all of those things, your Honor, are set forth in this management contract because that's what hotel managers do. They act on behalf of owners in terms of handling money, in terms of making reservations, in terms of making purchases. When someone, your Honor, acts on another person's behalf with the legal power to bind that other person, by definition, that is an agency.

## Proceedings

1  
2 THE COURT: Yes, but if, indeed -- I don't  
3 care if you call it agency or not. If two  
4 sophisticated business people enter into a 75-page  
5 single-space document called Management Agreement,  
6 which has in it very specific ways to terminate, or it  
7 could have been anything you decided to put in,  
8 whatever; but you have agreed on a certain course of  
9 conduct. And then, what really is bothersome, you then  
10 decide that you want to terminate this Management  
11 Agreement.

12 MR. RENARD: Yes, your Honor.

13 THE COURT: And you come to the State of New  
14 York, Commercial Division, New York State Supreme  
15 Court. You happened to come to Part 3, lucky you. And  
16 you're here saying to me, I want to terminate this  
17 contract. That's your complaint. Your complaint is I  
18 want --

19 MR. RENARD: Yes, your Honor. It was one  
20 claim we asserted. It wasn't by any means --

21 THE COURT: Whatever reason you decide, that's  
22 what you wanted to do.

23 MR. RENARD: Yes, your Honor.

24 THE COURT: And then beyond that, because not  
25 by order to show cause as is this Court's desire; but,  
26 nonetheless, a motion to dismiss is made, and it's

## Proceedings

1  
2 still pending down in the bows of this courthouse. One  
3 day it will be fully submitted. It will come by powers  
4 that be, freight elevator, because it will be so thick  
5 and big and it will arrive in my courtroom, and we will  
6 schedule it for oral argument. That will be the next  
7 step.

8 And then I will hear extremely good argument  
9 on one side and extremely good argument on the other.  
10 We will then put it over for a week or so, so we can  
11 get the minutes, and it will be fully submitted; and  
12 the Court will determine whether or not the motion to  
13 dismiss is correct or whether or not your complaint is  
14 correct. In other words, there will be a process.

15 MR. RENARD: Yes, your Honor.

16 THE COURT: Right. Then assuming that there  
17 is a mechanism of something happens in between this  
18 lengthy process -- and I'm not saying it's not --  
19 there's always the ability to come in by order to show  
20 cause for remedy.

21 And what can the remedy be? Judge, what  
22 Marriott is doing since we started this lawsuit, steal  
23 mutual money me, steal my reputation, look into get my  
24 internal affairs. Judge, you have to do something,  
25 terminate them as immediately; otherwise we, M Waikiki  
26 Hotels or M Waikiki LLC will be irreparable harmed if

## Proceedings

you don't do something about it.

And then the Court would have excellent argument. In this case you would be first, and then I'd hear excellent argument on the other side; and I would ponder this great problem and I would do something one way or the other which, if you didn't like what I did, you never know, you could immediately go to Madison Avenue and say, Judge, judges, Judge Bransten got it completely wrong, and she is still in irreparable harm situation. You've got to give the remedy I'm asking for. And then the Appellate Division confers with itself and does what it wants and you would have whatever.

The point I'm making, is that no one has forced you to bring this lawsuit in the beginning. This is motion sequence number 4, so I can only suspect that motion sequence number 3 is a motion to dismiss. Motion sequence number 1 and 2, more likely than not, admissions pro hac vice. I don't know why I think that, but it usually happens that way. Probably somebody is being asked to be admitted from Hawaii and can't wait to come to New York; but, anyway, that kind of motion, whatever it is. So you already were before me.

You already had the opportunity to be heard in

## Proceedings

1  
2 an orderly manner. I can't understand and what bothers  
3 me most is the two o'clock raid. What happened that  
4 caused anyone to get out and think that was an  
5 appropriate action?

6 MR. RENARD: Your Honor, most transitions of  
7 hotel management take place in the wee hours of the  
8 morning when there's less guest activity around a  
9 hotel. That has nothing to do with an invasion, middle  
10 of the night grab this kind of stuff. That's when  
11 transitions are made.

12 But if I may, your Honor, the point and it's  
13 fundamental to what we're talking about here. First of  
14 all, let's talk about the merits; and the merits, your  
15 Honor, is the fact that if this contract have all the  
16 indicia of agency, like I mentioned, and it does, and  
17 labels don't matter, disclaimers of agency and the  
18 like; I tried this very issue against Marriott and Ritz  
19 Carlton two years ago in Federal District Court in  
20 Maryland. It was the same argument.

21 We have a provision in our contract that says  
22 we're only an independent contractor, and we disclaim  
23 any other kind of relationship that could potentially  
24 give rise to damages.

25 THE COURT: That's true, sir, if that is  
26 exactly the argument that you made in Maryland, why is

## Proceedings

1  
2 it that your contract with Marriott today did not have  
3 an amended contract saying, I want you to realize this  
4 is an agency relationship terminable at my leisure and  
5 always at two o'clock in the morning, because that's  
6 when we terminate things?

7 MR. RENARD: It was not the same contract, and  
8 I wasn't involved in negotiating it.

9 With that said, the law in New York and law of  
10 restatement of agency, respectfully, is if there is an  
11 agency relationship, notwithstanding the terms of what  
12 the contract says, that the principal owner always has  
13 the power to revoke the agency even if it might be a  
14 breach of contract, which we respectfully suggest isn't  
15 the case here. But, your Honor, that was the case in  
16 Woolley versus Embassy Suites, and Pacific Landmark  
17 versus Marriott, and Government Guaranty Fund versus  
18 Hyatt, and Woodley Road versus Sheraton Corp.

19 All of those contracts, your Honor, were for a  
20 term of years; and they essentially said that this  
21 contract is not revocable or is only revocable under  
22 certain circumstances, and the courts in each of those  
23 cases found that notwithstanding those provisions, if  
24 the principal wanted to cut off the relationship, it  
25 could do so and the rationale, your Honor, is clear.

26 Do you want someone out there who has the

## Proceedings

power to spend your money, who can commit you to legal liabilities and obligations if you've lost trust and confident in them? That's why the law including --

THE COURT: Then why -- if that were true, you know, your argument would be I think a great deal stronger, sir, if, indeed, you did do the midnight or two o'clock in the morning raid. We're now here without any -- all the papers being the same, but your argument that this was an agency relationship and so, therefore, we had a right to do that, would have been stronger if you had not brought the lawsuit to begin with asking this Court for the dissolution of this agreement.

And so, so, what I'm saying, sir, is that once you in a sense avail yourself of the legal process, which I think is the appropriate way of acting by the way. I'm not saying you were wrong doing that. On the contrary. You did the right thing. You decided that I want to terminate this contract that I have with Marriott. It is not working out. I believe I have an agency right to do it. I believe this, I believe that. All right, great, great.

But, once you do that, you can't again self-help yourself. You're in a different position, because you already have a vote, the imprimatur of the

## Proceedings

1  
2 Court and you already have available to you the ability  
3 of the Court to give remedy; and once you start the  
4 process, you can't then turn around and say, well, you  
5 know, the Court's going to take so long. I'm going to  
6 go and do it myself. You can't do that. I don't see  
7 how you can do that. I don't understand the  
8 explanation.

9 I mean, it mind boggles me that it happened.  
10 I'm not saying it has nothing to do with you,  
11 personally; but whoever decided that this was an  
12 appropriate way of handling things has got to -- I  
13 don't know. How can anybody explain that?

14 MR. RENARD: Your Honor, first of all, the set  
15 of claims that were asserted in the lawsuit,  
16 preponderance of those are claims for money damages.  
17 We also asked the Court to determine whether or not  
18 there was an event of default under the contract, which  
19 might give rise to a claim for termination.

20 In addition to a event of default, which would  
21 be a right to terminate under the contract, there is  
22 this power which exists as a matter of common-law to  
23 revoke an agency.

24 Your Honor, I understand the Court's  
25 observations, but I, respectfully, don't believe that  
26 necessarily follows that one can't exercise a right to



## Proceedings

say, for instance, to an employee, you're fired.

THE COURT: Not when you come to Court to find out whether the contract allows you to fire him because of for no reason whatsoever, certainly not because of the terms that are usually within the employment contract; theft, malfeasance or whatever, right?

No, no, not when you will come to Court and ask the Court, Court, you help me in determining my remedy. Help me in my desire to get rid of this contract, help me with that. And, then become a self-help individual. No, you can't.

I really, honestly, I mean, I'll let you do another memoranda of law on what exactly, how can an organization that starts a lawsuit in the County of New York, in the Commercial Division of the County of New York, based on the whole premise that Marriott has failed to perform under my management contract; and so, therefore, help me terminate this management contract. I want to end it.

How can you then switch and become a self-help agency?

MR. RENARD: Your Honor, because I really don't see the conflict. It is not as if we had the Court in the middle of adjudicating that particular issue.

## Proceedings

1  
2 THE COURT: But, sir, by coming to Court, you  
3 are asking the Court to adjudicate; and, frankly, the  
4 Court is available even 24/7, if you knew that you  
5 could get Supreme Court action in Criminal Court in  
6 arraignment part middle of the night. So long as  
7 there's some place open, you can get an injunctive  
8 relief signed by a Supreme Court justice in the State  
9 of New York. It may be returnable to me the next  
10 morning saying I don't know what you would do about  
11 this, but for the time being, you got it.

12 MR. RENARD: Your Honor, the unfortunate thing  
13 about that puts the burden upon us with respect to a  
14 power that we possess inherently as being one who has  
15 someone out there binding us.

16 THE COURT: That's going to be an issue of  
17 law, sir, and that is exactly what you're asking me to  
18 do. You're asking -- you're saying to me, Look, I have  
19 an inherent power of agency. Never mind, I came to  
20 Court before and asked you to determine things. Never  
21 mind that I could have come to Court and asked by order  
22 to show cause for remedy. Never mind that. Because I  
23 have the right to terminate, I have the right to step  
24 in and self-help myself; and then, I think there is  
25 good argument to be made. What is this? You come in  
26 and you have another agency, another competing agency.

## Proceedings

1  
2 You do two more things, and you take all the  
3 information and let them take all the information.

4 MR. RENARD: No, your Honor.

5 THE COURT: Well, we don't know about that.  
6 That's going to be interesting. You put out a press  
7 release.

8 MR. RENARD: Yes, your Honor, because we're an  
9 ongoing business with customers and, your Honor, we  
10 did. We have a new --

11 THE COURT: No, sir, you're not an ongoing  
12 business with customers. You're an ongoing business  
13 that hires another business to run it. That's even  
14 your argument. Your argument is, I'm an ongoing  
15 business that hires somebody else to get me the  
16 contracts, to get me the groups, to get me the -- I was  
17 going to say patients, I suppose their guests -- get me  
18 the guests, get me to have all the maids come and clean  
19 the rooms. That's what I hired done.

20 MR. RENARD: Yes, your Honor.

21 THE COURT: Right. And I sit back and I say  
22 to myself, well, I expect a good return on my  
23 investment, and I don't think I'm getting quite the  
24 good return on this investment so, therefore, I can  
25 terminate? Well, maybe you can, sir. Maybe you can  
26 terminate. But in this manner, in this manner -- I

## Proceedings

1  
2 have to give everybody a head's up, we're exactly nine  
3 minutes away from closing the courtroom door, much less  
4 getting out of here.

5 So the question I have for both of you for the  
6 time being is this: Frankly, I may have to continue  
7 this tomorrow; but, frankly, I really would like you,  
8 sir, to seriously consider putting back the status quo  
9 ante, doing appropriate papers beyond the very short  
10 memoranda of law that I'm an agent and, therefore, I  
11 have all rights. Addressing the other issues and with  
12 the status quo ante in place, let's litigate this and  
13 you may very well prevail. Because I'm not saying  
14 you're not right. I'm just saying I'm appalled that  
15 this happened.

16 MR. RENARD: Your Honor, I would very much  
17 appreciate the opportunity to address the Court  
18 tomorrow.

19 THE COURT: You know, we'll have to see what  
20 time.

21 On the other hand, see, my problem is that I  
22 have to give remedy, and I honestly think that what has  
23 happened here is, is really -- to put it mildly --  
24 something that shouldn't have happened.

25 MR. RENARD: Your Honor, I respectfully  
26 request that if we could have a preliminary injunction

## Proceedings

1  
2 hearing before the status quo changes, again,  
3 because --

4 THE COURT: No, sir. See, you're taking the  
5 benefit of that and that's the problem. The problem is  
6 that because you self-helped yourself without the  
7 benefit of giving this Court the opportunity to rule on  
8 something, you are now enjoying the very juicy fruits  
9 of your bad actions. Talk about poisonous trees, you  
10 know the fruit of the poisonous tree. This is sort of  
11 like the apple tree. Not good, not good at all.

12 MR. RENARD: Your Honor, please, understand my  
13 role as the lawyer for my client.

14 THE COURT: I understand.

15 MR. RENARD: I don't think anything bad  
16 happened in terms of bad acts. I do understand the  
17 Court's observations about one of the claims that we  
18 brought for declaratory relief that would ask whether  
19 or not there was a right to terminate; but, your Honor,  
20 whether or not that's a bad act and all of a sudden  
21 puts the burden upon us in terms of trying to fight off  
22 an injunction, where there is --

23 THE COURT: Sir, Mr. Renard, I'm sorry, Mr.  
24 Renard, forgive me, Mr. Renard, your own desire is that  
25 you put back the status quo ante and that we litigate  
26 this in an appropriate way where I say to you, you may

## Proceedings

very well prevail. But, right now, what has happened is not appropriate.

I don't care that management, hotel management ends always at two o'clock in the morning. I didn't know that that was the witching hour for changes. Never mind. So I'm not commenting on that.

I'm just saying that taking self-help is an inappropriate thing to have done, and I suggest that you sit down with Mr. Handzo, come up with an agreement that for the time being, this is going to be status quo ante until litigation is appropriately done.

That's my suggestion. Otherwise, I, honestly, I don't know what to do. I'll have you back here. I can't start before 9:30, but you'll be my first thing on at 9:30.

What I really expect is some sort of status quo ante, and with that, I have to say good night, because my court officer is chomping at me and I have to close it up. I'm sorry. Usually, I'd go to six o'clock arguing this, but think about it. Let's try to get this to a more reasonable position.

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CERTIFIED TO BE A TRUE  
AND CORRECT TRANSCRIPT

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BONNIE PICCIRILLO  
OFFICIAL COURT REPORTER

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 3  
- - - - - X

M WAIKIKI LLC,  
  
Plaintiff,  
  
- against -  
  
MARRIOTT HOTEL SERVICES, INC.,  
I.S. INTERNATIONAL, LLC and IAN SCHRAGER,  
  
Defendant.

INDEX NO.  
651457/11

- - - - - X  
MARRIOTT HOTEL SERVICES, INC.,

Counterclaim-Plaintiff,  
  
- against -  
  
M WAIKIKI LLC,

Counterclaim-Defendant.  
- - - - - X  
60 Centre Street  
New York, New York  
August 31, 2011  
PROCEEDINGS

BEFORE:  
HONORABLE EILEEN BRANSTEN,  
Justice

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Bonnie Piccirillo  
Official Court Reporter



## Proceedings

THE COURT: All right, good morning, everyone.  
Please set up.

MR. RENARD: Good morning, your Honor.

MR. HANDZO: Good morning, your Honor.

THE COURT: And, Mr. Renard, what's the good word?

MR. RENARD: Your Honor, unfortunately, after prolonged discussions with our clients into the wee hours of the morning, our clients are not able to agree, your Honor, to simply reinstate Marriott as manager of the hotel for a number of reasons, your Honor, if I may. This hotel under Marriott management was losing \$800,000 a month? Could not even meet its normal expenses and, certainly, can't meet --

THE COURT: You have to speak up.

MR. RENARD: Can't meet its debt service or even its normal costs. It's losing \$800,000 a month.

Your Honor, we're on the verge of losing this hotel unless we can get control of management, and that's certainly one of the key reasons that our clients at least believed in good faith that they exercised their right to revoke Marriott's agency, and, your Honor --

THE COURT: You have to point to me, Mr. Renard, you're going to have to show me where in the

## Proceedings

1  
2 agreement there is any language allowing you to take  
3 this action?

4 MR. RENARD: Your Honor, it's not a  
5 contractual right. It's common-law right, your Honor,  
6 and I don't know if the Court had the time to review  
7 the brief that we put in yesterday, your Honor; but  
8 that brief I think shows very clearly a principal's  
9 common-law right to revoke an agent's authority, even  
10 if their exercise of that right is in derogation of a  
11 contractual provision.

12 Your Honor, the case law, the New York Court  
13 of Appeals has held this. This is in the restatement  
14 of agency, that if in fact the revocation and  
15 termination of an agent might be a breach of contract,  
16 that gives the terminated party a claim for breach of  
17 contract.

18 We don't believe and, your Honor, we'll show  
19 at a preliminary injunction hearing, at a trial and  
20 certainly, your Honor, we would agree to an accelerated  
21 trial; we'll certainly agree to bring in live witnesses  
22 at a preliminary injunction hearing that this power was  
23 properly exercised, your Honor.

24 And, your Honor, I really do respectfully  
25 request that the Court take a look at that brief,  
26 because I think it shows, without doubt, that this was

## Proceedings

1  
2 an agency contract merely because of the powers that  
3 were given Marriott to act on the owner's behalf. And  
4 under New York law and the law, frankly, of practically  
5 every jurisdiction in the United States, the power to  
6 revoke that agency was properly exercised Sunday  
7 morning. And at that point in time, Marriott ceased  
8 being our agent and operator of our hotel.

9 We changed the status quo drastically by  
10 bringing in a new management company hiring 215  
11 employees --

12 THE COURT: From the Marriott employees.

13 MR. RENARD: Yes, your Honor, people who  
14 willingly signed up, and they were not threatened they  
15 were going to be fired. These were people who signed  
16 up.

17 THE COURT: I'd love to hear some testimony on  
18 that.

19 MR. RENARD: Absolutely, your Honor, we'd be  
20 glad to provide it to the Court. Except we found out  
21 yesterday that Marriott has been calling the hotel  
22 vendors requesting and encouraging the vendors not to  
23 do business with the hotel. They're encouraging  
24 setting up across the street from the hotel,  
25 encouraging hotel employees not to come to work. These  
26 are people who signed up to work at the new modern

## Proceedings

hotel.

THE COURT: Let me ask you this question, Mr. Renard.

Where in the agreement are the words "this is an agency?"

MR. RENARD: It's not there, your Honor, but that's not controlling.

And, in fact, your Honor, if I may point to the Court in our brief yesterday, your Honor, Section A, which is on pages 1 through 6, speaks comprehensively about the inherent power to revoke an agency.

Section B, your Honor, which is on pages 7 through 10, talks about the powers and cites specific provisions in the Management Agreement that show in numerous respects that Marriott had the power to bind the owner, to spend the owner's money, to commit the owner to business relationships. All the things are classic indicia of agency manager.

And, your Honor, then we point out --

THE COURT: Of all the classic indicia of a contract.

MR. RENARD: Of an agency contract.

THE COURT: Of a contract.

MR. RENARD: Yes.

## Proceedings

1  
2 THE COURT: And, therefore -- see, my problem  
3 still remains that you come to court and you filed by  
4 summons and complaint an action in this Court. My  
5 issue is not whether or not you prevail. That's not  
6 the issue here.

7 The issue is you come to court and you file a  
8 complaint, and that complaint, in a sense, opens you up  
9 to the jurisdiction of this court.

10 You asked, in fact, you say, I want to be in  
11 the Commercial Division of this grand court, and you  
12 are assigned to the Commercial Division. And you come  
13 and you never again, in a sense, appear. They appear  
14 in motion sequence number 2 and 3 with motions to  
15 dismiss the complaint, right?

16 MR. RENARD: Yes, your Honor.

17 THE COURT: And I presume you're going to  
18 answer those motions, you've proposed that, and I  
19 assume reply and one day it will get up to me and we'll  
20 have argument on it.

21 My problem is that by coming in with the  
22 complaint -- where is it? My problem is that the  
23 complaint -- there's a number of causes of action. One  
24 is breach of the agreement.

25 Two, is -- and by the way there is one, as far  
26 as I see -- I may be wrong, I have to find it again --

## Proceedings

1  
2 there is one statement that as a result of the action  
3 that was undertaken, they entered into an agency  
4 relationship in the complaint. There is one that I see  
5 as of now. I'm not saying there isn't others.

6 It's just that I'm taking a very quick perusal  
7 of it, but what point I'm making is that there is  
8 twenty, nineteen-and-a-half pages of recitation of  
9 facts leading to count one, a breach of the TSA; count  
10 two, a breach of the Management Agreement; count three,  
11 breach of fiduciary duty; count four, negligent  
12 misrepresentation; count five, request for judicial  
13 declaration regarding the occurrence of an event of  
14 default and the owner's right to terminate the  
15 Management Agreement.

16 Now, that last count could very well have been  
17 a basis for you, your client --

18 MR. RENARD: I understand.

19 THE COURT: To come to court to ask for  
20 extraordinary relief on the grounds that, first place,  
21 what has happened is irreparable harm; two, we have the  
22 likelihood of success; three the equities go in your  
23 favor and et cetera and et cetera; right?

24 MR. RENARD: Yes, your Honor.

25 THE COURT: And by doing so, you would be in  
26 the position today of either being granted your request

## Proceedings

1  
2 for relief or not, but certainly you'd be on the basis  
3 of having come to court and done it in a, quote, legal  
4 manner versus taking self-help.

5 Now, self-help is something that is not  
6 condoned in the legal system; because if we believed in  
7 self-help, we'd be back at the club days. We'd have a  
8 big club and you'd have a big club, and whoever clubs  
9 first does better. All right.

10 MR. RENARD: Your Honor, the notion of  
11 self-help -- and we did a considerable amount of  
12 research last night. The notion of self-help has, and  
13 I think the Court pointed out, embedded in it a notion  
14 of some wrongdoing or doing something you weren't  
15 allowed to do.

16 Your Honor, again, respectfully, as pointed  
17 out in the brief that we filed yesterday, we had the  
18 right to do this. And, your Honor, we can find no  
19 authority for the fact -- and I tried to distinguish  
20 this yesterday and, perhaps, I didn't do a good job of  
21 it.

22 Count five, your Honor, was coming to Court  
23 and saying we believe there's an event of default;  
24 that's a clearly defined term under the contract. And  
25 a result of that, we would like a declaration that if  
26 we terminate because of that, we do so impunity. That

## Proceedings

means without having a counterclaim for wrongful termination. That's separate and apart, your Honor, from the power to terminate.

Our client made the decision. Now, the Court may think it imprudent, but we believed it was allowed by law to exercise that power to terminate the agency and leave open for later consideration whether that was wrongful in which case they might have a claim for damages, or whether it was for cause, in which case we would be able to recover damages against them for the harm that they caused us prior to the termination.

But, your Honor, those are two separate things. But, respectfully, your Honor, the point is is that if the right was appropriately exercised and we could find no authority for the exercise of power that's given to us as a matter of law within or outside the context of litigation or whether or not litigation even exists, that that power be rightfully and effectively be exercised.

The problem then, your Honor -- and one of the things -- we have to step back, if I may do this.

We have a request for a preliminary injunction, but we also have a request for a TRO, which under CPLR Section 6301 which requires a showing of immediate and irreparable injury.



## Proceedings

1  
2 Your Honor, the relief that they seek, and I  
3 compared the proposed order that they gave the Court  
4 and it's been modified slightly to add one thing; but  
5 if I may, the proposed order given on the TRO, 6301  
6 TRO, is among other things an order that owner must  
7 allow Marriott to fully perform its role as the hotel's  
8 manager in accordance with the Management Agreement.

9 In other words, a mandatory affirmative  
10 temporary restraining order that changes the status  
11 quo, forces us to fire our current manager Aqua, cancel  
12 contracts with vendors that Aqua has entered into,  
13 change the signage, change the computer systems that  
14 have been put in by Aqua on a temporary restraining  
15 order which is a mandatory and affirmative in nature.

16 THE COURT: I know, but the problem -- I  
17 understand your argument, but the problem I face is  
18 that because of your client's actions, it is squarely  
19 in the self-help category.

20 Had you come to court on an order to show  
21 cause saying, We need immediate relief and a complete  
22 turnover right now based on my complaint, based on  
23 what's happening now, whatever new facts, whatever new  
24 affidavits you come in with; then you would be in the  
25 position of asking this Court for permission to do what  
26 you ultimately did, by just doing it. And that my

## Proceedings

1  
2 problem is not whether or not you're going to prevail;  
3 but rather that, indeed, the argument now is, Oh, we  
4 went and did the self-help, and look what happened. It  
5 would be irreparable harm to us, because we changed the  
6 signage. We put our computers in, we did this, without  
7 legal proceeding.

8 MR. RENARD: But, your Honor, the presumption  
9 in that is that we didn't have the power, and it was  
10 somehow wrongful to exercise that power, your Honor.  
11 And that's just not the case.

12 And, your Honor, if -- on a merits related --  
13 and there ought to be some consideration on merits on a  
14 TRO. If they had no right to be reinstated and if we  
15 had the right and power to do what we did; then the  
16 underlying notion that there's some wrongdoing that  
17 needs to be restrained or some status quo that needs to  
18 be undone, your Honor, is just incorrect.

19 THE COURT: But, I don't know, maybe I'm too  
20 much of a judge. Maybe, maybe, it just so appalls me  
21 that all I have to do in life, is put out a complaint  
22 and then I can do whatever I want all because I have  
23 the right, I have the right. I say it's an agency, so  
24 never mind that the Court hasn't ruled on that. Never  
25 mind that we have a contract. Never mind all of that.  
26 But, since I say that it's an agency, I have the right

## Proceedings

1  
2 to do whatever I want. Come in with the big club, club  
3 people to death and then say, you know, if I have to go  
4 back to what it was before, Gee, I would be humiliated  
5 ed.

6 You shouldn't have done it to begin with.

7 MR. RENARD: But, your Honor, and that's  
8 why -- and I'm sorry if I do this, but when I talk  
9 about what's in that brief, it's of critical  
10 importance.

11 THE COURT: I read the brief.

12 MR. RENARD: Well, your Honor, the notion that  
13 self-help and clubbing people, that's a little  
14 different than when the New York Court of Appeals says,  
15 you know, there is a policy of this state that if a  
16 principal has lost trust and confidence or otherwise  
17 doesn't want an agent out there, even if it's a 30-year  
18 airtight, 70-year, 100-year contract, doesn't want that  
19 agent out there binding that principal to legal and  
20 financial responsibility; we're going to give that  
21 principal the power, the unfettered power subject to a  
22 potential claim for breach of contract to terminate  
23 that agent. And, you know, your Honor, that's not only  
24 the policy of New York, but it's everywhere in this  
25 country.

26 THE COURT: You know, I know you have a number

## Proceedings

of citations here. One of them is interesting. A Slip opinion. This is, I think, cited to GK Alan Associates versus Lazzari at 44 A.D.3d 95, cited to page 102.

A Second Department 2007 case and says here:

"A principal is always free to terminate the agency relationship subject to a claim of damages by the agent. The disloyalty of the agent entitles the principal to avoid such claims, at least to the extent that the claims involve future compensation."

Here, we talk about disloyalty. I mean, none of these cases mean anything without the facts.

MR. RENARD: Your Honor, in fact, as the cases we cite point out -- and we had cause here, your Honor, but that's a separate thing to be adjudicated later.

The cases point out, your Honor, it's not a cause right. It's not a cause power. A principal can terminate and revoke an agent's authority at any time and for any reason or no reason at all.

THE COURT: You cite Smith versus Conway, 1950 Supreme Court case and cited in 198 Misc.886, which and I have no idea who wrote this. It doesn't say who wrote it.

Quote: "A principal, at least, generally is permitted to revoke an agency when he pleases, even though he has a contracted with agent for a definite

## Proceedings

period of time."

All of this is interesting, but you talk to the Court of Appeals case. Is that the Wilson case, you're talking about?

MR. RENARD: Yes, your Honor, yes.

THE COURT: You have a copy of it, right?

MR. RENARD: No. Yes, your Honor, we do, we do.

THE COURT: Yes, you've been very silent for very long.

MR. HANDZO: If I can just take a moment to respond, your Honor.

THE COURT: I don't think he's quite through.

MR. HANDZO: If we're handing up cases, your Honor, we have one, as well.

THE COURT: Yes, you have Barbara Kapnick's case?

MR. HANDZO: Yes, your Honor.

THE COURT: And that one was issued on July 13, 2010, on a case Madison 92nd Street Associates versus Courtyard Management Corp..

Let me ask you a question. At what stage of the appeal is it at?

MR. HANDZO: That I do not know, your Honor.

MR. RENARD: Your Honor, I'll also point out

## Proceedings

1  
2 that in that case, the Court dealt with a claim -- and  
3 this is what appears on the face of that opinion. A  
4 claim that there was some general fiduciary  
5 relationship of trust and confidence. It doesn't even  
6 appear from that opinion that an argument of agency was  
7 even brought to the Court, that the owner went through  
8 the contract, argued that there was an agency by virtue  
9 of the provisions in the contract and, therefore, that  
10 there is -- it's not a termination question. Its  
11 whether or not a fiduciary relationship was created.  
12 That's not even a termination case and doesn't apply to  
13 this notion of revocation of agency.

14 Now, Marriott will say, well, there's a  
15 disclaimer of fiduciary duty in that case, just as  
16 there is in ours, your Honor. We've pointed out, your  
17 Honor, in Section B of our brief, that labels, such as  
18 there is or there is not a fiduciary relationship,  
19 labels such as there is an agency relationship or  
20 disclaimers of an agency are not controlling.

21 And, your Honor, we also had a case that we  
22 had before Justice Gammerman involving, by the way, Mr.  
23 Schrager, who's also one of the defendants in this  
24 case, where the Court went on at length and talked  
25 about how labels disclaiming agency and disclaiming  
26 fiduciary duty are not binding, your Honor. And if I

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may present the Court with a copy of that case, as well.

(Handed up to the Court)

THE COURT: Yes, let me read this case. Let me read the Court of Appeals case, which I just want to point out is 1954.

Well, I don't know, Mr. Renard, I don't know if I agree with your interpretation of this case. Let's go over it a little bit.

This is the Wilson Sullivan Company, Inc. versus The International Paper Makers Realty Corp. It is cited at 307 NY 20. It was argued on March 12th, 1954. Decided on April 23rd 1954.

And just for interest sake, I wonder who was our bench. I don't know. It was, the opinion was written by Judge Froessel, and there is a dissent. And the bench was, the Chair was Judge Lewis, Conway, Fuld, Froessel, and the dissent was Judge Dye. And Judges Desmond, Van Voorhis joined in Judge Dye's dissent.

But, taking the majority, first place, the contract that you're dealing with -- and I think you have to begin with -- is a contract that -- and the issue that was there, is whether or not the trial judge erred when he did not grant summary judgment and did not say that there wasn't a cause for damages in this

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particular instance.

And it goes on, first place, to explain that the plaintiff had an exclusive, as exclusive renting and managing agent for the building owned by the defendant, was to receive a compensation for its services at five percent of the total amount of rental collections.

The duration and provisions for termination of this agreement were provided for in the is 7th paragraph which reads in part, and, of course, that's the key element in this particular agreement, because you don't have that.

"The agreement shall continue in full force and effect until the last day of February 1948 and if not terminated by either party, giving the other party thirty days prior notice in writing, shall continue from year to year until terminated by either party at the end of an extended yearly term by the giving of a like notice."

So it turns out that the defendant herein wants to sell the building, and the issue that is before the Court is whether or not they had the right to terminate the plaintiff's right to collect the rent, five percent of the rentals by just deciding to sell the building unilaterally. Because nowhere in the



## Proceedings

1  
2 contract or the agreement was there any provision made  
3 for the defendants, the owner's right to sell the  
4 building.

5 So, as a result, the conclusion that the  
6 majority came to, "We are, therefore, of the opinion  
7 that the trial court erred in dismissing plaintiff's  
8 complaint for legal insufficiency. We are further of  
9 the opinion that on the record before us, defendant has  
10 failed to raise any triable issues of fact, except as  
11 to the amount of damages. Indeed, the parties agreed  
12 that as a special term, that the problem is purely one  
13 of law. Consequently, plaintiff's motion for summary  
14 judgment should have been granted."

15 Now, you point -- you outline for me a  
16 section -- well, first place, you outline a very  
17 interesting section, but we have to do the sentence  
18 that precedes it.

19 "At the outset, we should sharply distinguish  
20 between the parties' powers, rights and duties arising  
21 out of the contract itself, and those arising under the  
22 agency relationship created by the contract."

23 So, you do have a distinction that has to be  
24 made here.

25 "It is well settled that with but a few  
26 exceptions not pertinent to the facts of this case, a

## Proceedings

principal has the power to revoke at any time his agent's authority to represent him. This is not to say, however, that in doing so, he is immune from liability to the agent for the breach of the contract. Thus, while defendant has the power to terminate at will his agency relationship with the plaintiff; if in so doing it violated his obligations under the contract, it must respond to the plaintiff in damages."

So, that's what you're holding on, and that is what you're saying to the Court allows you to take this unilateral action.

MR. RENARD: If I may, your Honor? This case, I think, proves the point that I've tried to articulate to the Court.

That in this case, which is interesting because it wasn't a hotel manager, but it was a manager of a building who not only had property management agency responsibilities, but also to enter into leases on behalf of the owner's building so a classic agency.

The Court recognizes that when the owner of the building said agent, you're no longer my agent, that's effective immediately.

The question that arises was that revocation a breach of contract? Which I acknowledged yesterday and I acknowledge today, that is an issue that remains to

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1  
2 be determined in this case; and if they're able to say  
3 oh, it was a wrongful termination because of X, Y and  
4 Z, then I'm entitled to all my future compensation  
5 under this agreement, I acknowledge that. I think  
6 we'll be able to defeat that claim and, in fact, have a  
7 claim for damages back against them; but the underlying  
8 principal, your Honor, and I think it's articulated  
9 throughout here is that, yes, and you were right to  
10 point out there's a difference between the common-law  
11 power to revoke and terminate an agent's authority.

12 You can do that. You might be rightful in  
13 doing that in which case you can deal with impunity and  
14 not be subject to a counterclaim for damages; or in  
15 doing that in terminating your agent, you might have  
16 violated the contract and subject yourself to a claim  
17 for damages.

18 This Court acknowledged that the revocation  
19 was effective, but it was incorrect to dismiss the  
20 terminated agent's claim for damages because there was  
21 a possibility that it had a claim because it was a  
22 possibility of a wrongful termination.

23 And, your Honor, that's precisely the point.

24 And if I may, your Honor, go back to something  
25 I had said before. When I was reading to the Court the  
26 relief that is requested here, not only to reinstate

## Proceedings

1  
2 Marriott's so it can perform in accordance with the  
3 contract which we believe was terminated or agency was  
4 revoked under; to undo the harm and damage that  
5 resulted from owner's purported ouster of Marriott,  
6 whatever that means, to unilaterally -- not to  
7 unilaterally install another hotel manager which, of  
8 course, has already been done.

9 Your Honor, the reason I go through this, if  
10 you go to the counterclaim that they filed yesterday,  
11 the final and permanent injunctive relief that they ask  
12 for is identical to what they ask for in a TRO; which  
13 means not only in a preliminary injunction, which has  
14 its own rules regarding affirmative mandatory  
15 injunctions, at a TRO stage when they have to show  
16 immediate and irreparable injury pending a hearing  
17 which could happen next week subject to the Court's  
18 availability or the week after, that they want to  
19 reinstate and effectively get the final relief that  
20 they seek which the courts are pretty clear, you can't  
21 get by way of preliminary injunction, let alone a  
22 temporary restraining order, the relief that they seek.  
23 And here's the problem, your Honor.

24 If the Court were to enter a TRO staying  
25 reinstate Marriott, then what are we really litigating  
26 once we come to the preliminary injunction stage?

## Proceedings

1  
2 Because Marriott is already in. There's nothing -- the  
3 Court can say, oh, preliminary injunction denied.  
4 Well, if it was denied, then where are we? The status  
5 quo has changed. Marriott is back in business  
6 operating our hotel against our will.

7 My point is, forgetting whether or not they  
8 could even get this relief by way of a preliminary  
9 injunction after a hearing and full opportunity on our  
10 part to respond with the factual affidavits, they want  
11 their final relief by way of a temporary restraining  
12 order.

13 THE COURT: Well, they're attempting to get  
14 back to where they were.

15 Let me hear from Mr. Handzo.

16 MR. RENARD: Your Honor, one last point I need  
17 to say this.

18 Wholly apart from this power to revoke an  
19 agent's authority -- and we do address this in our  
20 brief and I won't belabor it -- there's a separate and  
21 independent reason why in hotel management contracts  
22 that there should not be injunctive orders requiring  
23 the two parties to continue to do business with one  
24 another.

25 The courts have held that hotel management  
26 agreements constitute --

## Proceedings

1  
2 THE COURT: You know what, I don't have any  
3 disagreement with you. Mr. Renard, it comes down to  
4 the same thing.

5 You were already before this Court. You  
6 already had -- you already had the power of this Court  
7 behind you, in a sense, by coming and filing a  
8 complaint. You now avail yourself of rather plenary  
9 powers that the Court has; but not to come to this  
10 Court and ask for such relief is really -- not only are  
11 you kicking the Court's teeth, but really self-help  
12 involvement that is, frankly, mind boggling. And all  
13 you had to do is, indeed, ask this court For that  
14 power.

15 All you had to do is bring by order to show  
16 cause an immediate declaration that you had the right  
17 to take over the future -- the management and the  
18 control of the this building, this hotel, sorry, based  
19 on your agency relationship. And putting aside whether  
20 or not they had damages, all you had to do is come to  
21 this Court and ask for it. And that is the problem;  
22 the problem is the self-help. Not the problem that you  
23 point out that we have a right to do it.

24 I don't know, once you come to the Court you,  
25 in a sense, subject yourself to a different plane. You  
26 subject yourself to the magistracy of this Court. You

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1  
2 don't go around, I mean, you know, you come to Court  
3 and you say, he's about to hit me and I'm asking this  
4 Court to protect me. And you come up with proper  
5 things and you say, well, you know what, I'll hit him  
6 first. Instead of coming into Court and saying you  
7 know, can I have the right to hit him, because he's  
8 about to hit me?

9 MR. RENARD: Your Honor, if I may address  
10 that, because it's an observation the Court had  
11 yesterday, and I do appreciate what your Honor is  
12 saying.

13 I want to make sure, your Honor, in invoking  
14 this right and power, we certainly didn't mean to  
15 offend the Court. I speak on behalf of my client --

16 THE COURT: You're not offending me  
17 personally.

18 MR. RENARD: I speak to your Honor and I speak  
19 to the Court as a system. We weren't meaning to kick  
20 the system in the teeth. We didn't believe we were  
21 doing something that, in effect, was a derogation of  
22 the Court's authority or I think language used  
23 yesterday was doing an end around the Court. Your  
24 Honor, I would never certainly do anything to offend  
25 the Court or that I believe was an end around or doing  
26 something that somehow meant to escape the Court's

## Proceedings

1 powers and things like that. I find that abhorrent,  
2 and at least I can say this. That wasn't the intention  
3 of either my client or this law firm in my client in  
4 pursuing this action or my law firm in making the  
5 arguments we make, your Honor.  
6

7 With that said, and I think our client even  
8 says that, your Honor, in an affidavit that we prepared  
9 last night. I'm not sure if the Court received it. We  
10 have copies.

11 THE COURT: No, I haven't read it, but I did  
12 receive it.

13 MR. RENARD: I just wanted to say that, your  
14 Honor, because I understand the Court's observations  
15 and I, certainly, don't want the record to reflect  
16 anything other than if we offended the Court or the  
17 powers of the Court, we apologize for that. And,  
18 certainly, your Honor, our actions and the actions of  
19 our client were done in a good-faith belief that we had  
20 the right and the power to exercise what we believe the  
21 law gave us in that regard.

22 And so, your Honor, because this is really a  
23 personal services contract, it's sought to be  
24 specifically enforced; and given the fact that they  
25 seek the final relief that they asked for in their  
26 counterclaim yesterday; your Honor, at a minimum, we



## Proceedings

1  
2 would ask that we could roll this up and present all  
3 the evidence and all the arguments in a preliminary  
4 injunction hearing just as soon as the Court would have  
5 us do so. But I just believe that this temporary  
6 restraining order, even given the Court's observation  
7 about what has happened, is just inappropriate to do  
8 this given the requirements of 6301 and I would say  
9 this, your Honor, too, and I did mention this  
10 yesterday.

11 Mr. Ken Rehmann, who did an affidavit, talks  
12 about all this parade of horrors, that the damage to  
13 the reputation of Marriott and the damage to the  
14 Edition brand; it's very interesting, your Honor,  
15 because Mr. Rehmann defines Marriott to be the parent  
16 company, Marriott International, which we believe is  
17 the one who owns the Edition brand, which we believe is  
18 the one that owns all the intellectual property that  
19 they so complained about.

20 Marriott International, your Honor, isn't even  
21 a party to this lawsuit. Catherine Young, another  
22 person who did an affidavit for them, talks about all  
23 the harm to Marriott, defined as Marriott  
24 International. They don't even have the right party in  
25 here to complain about irreparable harm, that they  
26 haven't even proved is immediate in the sense that this

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case wait till preliminary injunction hearing.

And furthermore, your Honor, the mandatory injunctive relief that they request, reinstatement of Marriott as manager would require us to fire Aqua -- I understand what the Court says, perhaps that's an issue of your own making. But, your Honor, that implicates contractual rights of a party that isn't even before the Court, Aqua. So we have a party, Marriott International who's claiming the irreparable injury, and one of the things they seek by way of temporary restraining order is, essentially, to terminate contractual rights of Aqua who's not before this Court.

There are all sorts of procedural problems and they should --

THE COURT: Would you say that Aqua is an agent of yours?

MR. RENARD: It is, your Honor, but that doesn't mean -- I mean, they are an agent pursuant to a contractual relationship which we have with them. We have an interest in that contract, and they have a separate interest in that contract.

So, my point, your Honor, is --

THE COURT: Yes, but if, indeed, I decide to restrain you, then you, as the parent to Aqua, the agent, the mere agent, can be dealt with in the same

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way as you dealt with as the mere agent of Marriott.

MR. RENARD: Well, your Honor, my only point is Aqua is not before the Court. You're talking about terminating the contractual rights of a party. We're a counterparty to an agreement with Aqua.

The point being, your Honor, the relief that they seek by way of -- again we're not at a preliminary injunction stage. We're at a temporary restraining order stage.

THE COURT: I think we are and I'm going to have to close it up so I'm going to have to ask Mr. Handzo to speak.

MR. RENARD: Thank you for your time.

MR. HANDZO: Thank you, your Honor.

Let me just take the points in the order that Mr. Renard addressed; and first of all, he started off talking about how the hotel was losing money.

I want to be clear about one thing. To the extent the hotel has operating losses, my client is paying them, not them. The contract requires them to pay the operating expenses of the hotel. However, they have refused to fund working capital requests so actually it's Marriott paying the money right now.

This claim of due and owing money, now it's actually Marriott that's paying.

## Proceedings

1  
2 With respect to this agency issue that we've  
3 debated so long. We did file a motion to dismiss. We  
4 have an argument in there that addresses the agency  
5 issue.

6 I'm happy to provide that brief to the Court,  
7 if you want it. Obviously, the reason we addressed  
8 that issue in our motion to dismiss is because it's  
9 very much a part of their complaint. They raised it in  
10 the complaint. So we address it in the motion to  
11 dismiss, and we have a more fulsome discussion there.  
12 If the Court wants to see it.

13 Now, Mr. Renard's legal argument for the most  
14 part assumes the conclusion that he wants to reach.  
15 Basically, what he does is he gives you cases where an  
16 agency relationship exists, and then he says the  
17 following consequences flow from that agency  
18 relationship.

19 The problem is, he's assuming in this case  
20 that there is an agency relationship to begin with, and  
21 there isn't and you know there isn't for any number of  
22 reasons.

23 First of all, we have our contract.  
24 Obviously, a good place to start, and there's a couple  
25 of interesting things about the contract that I think  
26 the Court mentioned yesterday, but bear repeating.

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1  
2 The contract has a couple of places where it  
3 says you can't terminate without a judicial finding.  
4 In the provisions that deal with termination for  
5 default, for example, it says, If one party claims a  
6 default and the other party contests it, there cannot  
7 be a termination until a Court has resolved that  
8 dispute.

9 THE COURT: Where is that?

10 MR. HANDZO: That it 9.02, I believe, your  
11 Honor.

12 MR. FISCHER: 9.03.

13 THE COURT: Can you give me the page number?

14 MR. HANDZO: Page 38.

15 It's at the bottom of page 38, your Honor.

16 Your Honor, we also quote it and deal with it  
17 on pages 9 and 10 of our brief.

18 THE COURT: Okay. Good.

19 MR. HANDZO: And the point here, your Honor,  
20 is why in the world would we put a provision like that  
21 in a contract that says it can't be terminated for  
22 default without a judicial ruling if it could be  
23 terminated at any time for any reason? That just  
24 doesn't make any sense.

25 Likewise, there's another provision in the  
26 contract that I mentioned yesterday, 2.03, that says:

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Even if you have a basis to terminate, you can't terminate where there is money owed to Marriott which there currently is.

So, again, we've got all these provisions that deal specifically with termination and make it clear that there's simply no right to just decide that I want to terminate. You have to have a judicial determination, and there are certain requirements beyond that like making sure there's no money outstanding which there is.

And I'm sort of glossing over maybe the most important feature of the contract, which is that it expressly says that Marriott is not the agent of M Waikiki.

THE COURT: Where is that?

MR. HANDZO: That is in --

MR. FISCHER: Pages 43 and 44, 11.03 Relationship.

THE COURT: What I like is the people back there that really know what they're talking about.

MR. FISCHER: I'm just a spectator.

MR. HANDZO: Further away from counsel table they are, your Honor, the more they know, generally.

But, yes, it's pages 43 and 44, Section 11.03.

THE COURT: All right, let me read that.

## Proceedings

MR. HANDZO: Sure.

THE COURT: Okay.

MR. HANDZO: So as you can see, your Honor, the parties, two sophisticated parties got together, drafted a very complex and comprehensive agreement and expressly agreed that Marriott is not the agent of the owner; and, indeed, went further and expressly agreed that M Waikiki would not make that argument in Court which, of course, Mr. Renard has now spent about an hour doing exactly that, completely in contradiction to what the contract expressly binds his client not to do.

THE COURT: Well, what he's saying and actually and produce a case to support his saying, is that, yes, we had a contract; however, our entire relationship was one of principal versus agent; and, therefore based on agency rules, separate and apart from the contract which could lead to you, Marriott, receiving damages, substantial amount of damages, if you, indeed, can prove that you fulfilled your portions of the contract and they didn't and they, in fact, impeded you from doing that. But, separate and apart from that, they have a principal and agency relationship.

Now, I know it says in the contract you won't mention agency, and Mr. Renard says to me it doesn't

## Proceedings

1  
2 matter what it says in the contract. In fact, the  
3 relationship between Marriott and M Waikiki LLC was one  
4 principal, being Waikiki, versus agent. And so,  
5 therefore, while maybe our actions are despicable, we  
6 never had the right to do it because of the agency  
7 relationship.

8 MR. HANDZO: And, your Honor, that argument  
9 that Mr. Renard is making is exactly what was argued to  
10 Justice Kapnick in the 92nd Street decision that we've  
11 given to you. They said exactly the same thing.

12 The Court in that case had a contract with  
13 virtually identical language.

14 THE COURT: But was this decision and order  
15 made on a motion to dismiss? Was it made on a -- see,  
16 my problem now and, frankly, this is something you have  
17 to address. My problem is whether or not the plaintiff  
18 acted in an appropriate manner.

19 Certain actions have occurred, and what Mr.  
20 Renard is telling me is that if I, in the sense  
21 eradicated those actions, that it would eradicate the  
22 principal's ability to do what it has the right because  
23 they're the principal and you're the agent.

24 MR. HANDZO: No, I don't think it would. What  
25 it would do is it would preserve the status quo until  
26 they could come back into Court and make the case to



## Proceedings

you that they really do have a right to terminate.

I mean, that's what we're really saying here. I mean that's what, despite Mr. Renard arguing that we're really asking for some final irrevocable relief; the reality what we want here is to have what we had at one o'clock Sunday morning until somebody has a chance to just come into this Court and have this all out and have the Court make a decision, which is what the contract, obviously, contemplates.

And Mr. Renard's argument on that point really smacks us saying, you know, I shot my parents, and you should have leniency on me, because I'm an orphan.

I mean --

THE COURT: Hutzpah?

MR. HANDZO: Yes, Mr. Renard is from Texas, so we might have to translate that, but, exactly --

MR. RENARD: I got it, David. Thank you.

MR. HANDZO: They have a New York office. I forgot.

You know, they put us in this situation; and then to come in and say, oh, you have to overcome all of these legal hurdles because we took this extra judicial action without coming to Court and now you have to, you know, overcome this huge legal burden; he's completely got it backwards.

## Proceedings

1  
2 They put us in this situation. They have  
3 nothing to complain about if we go back to where we  
4 were a very short time ago. And the status quo really  
5 is that from the perspective of guests, people coming  
6 to the hotel, people book parties. This is a Marriott  
7 property. The guests who are coming in the future are  
8 still expecting the Marriott property. That's what  
9 they're expecting.

10 The other thing I want to highlight, because  
11 it is something that really concerns my client. We do  
12 have a lot of proprietary information on that property,  
13 and we're getting reports that computers are -- they're  
14 yanking out the hard drives. There are post-it notes  
15 on computers which say cracked, which in the computer  
16 lingo means -- as I understand it -- that they have  
17 broken the passwords. They're circumventing security  
18 devices. That's ongoing now, and we need to stop that.

19 So, the equities here are clearly in favor of  
20 putting Marriott back where we were just a little while  
21 ago. If they want to then come to Court and argue this  
22 agency issue we think they're totally wrong. We think  
23 Justice Kapnick got it exactly right. They are  
24 basically saying if you look at the contract as a  
25 whole, we have certain rights and responsibilities to  
26 make us an agent. That exact argument was made to

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Justice Kapnick. She expressly rejected it. If you look at that decision she says, I'm looking at the whole contract. I'm seeing what you're saying, but I don't buy it, and that's the best law we have and most on-point law we have.

In fact, the cases that they cited yesterday, that they principally relied on, Woolley case from California, is a case where the contract said exactly the opposite. It says, we are an agent and so on that basis the Court found that they are an agent.

This case is exactly the opposite. Justice Kapnick just says you have to follow that.

MR. WEINER: Your Honor, may I just add a word? I'm sitting her patiently. I represent Ian Schrager, the defendant.

THE COURT: This is Mr. Weiner.

MR. WEINER: My name is Robert Weiner.

What has happened has had significant impact on my client, as well. There was a press release that was issued by the plaintiff. It was covered worldwide in all the press, in particularly, the hospitality press. My client is already getting significant questions from the press what happened, and my client's reputation is very much involved here.

So from our prospective, we think this needs

## Proceedings

1  
2 to be resolved very, very quickly, because we have  
3 significant reputational issues that, again, I haven't  
4 joined in because it's not my Management Agreement, but  
5 I think your Honor should be aware of that.

6 THE COURT: All right, thank you. I want to  
7 take a break.

8 (Short recess taken.)  
9  
10  
11  
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13

14 (Continued on the next page.)  
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## Proceedings

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5 THE COURT: First place, I want to  
6 thank both sides, everyone for their excellent  
7 presentation. This is a very serious issue, without a  
8 doubt, and I think that both sides have articulated  
9 their positions very clearly and very expertly.

10 So, for that I commend both sides.

11 However, in the balancing of everything, the  
12 Court has decided as follows:

13 The Court is going to grant the temporary  
14 restraining order. The Court understands that this is  
15 obviously -- well, the Court believes -- I think I'll  
16 put it this way.

17 The Court believes that in the balance of  
18 everything, that the Waikiki actions by coming in at  
19 two o'clock on a Sunday morning when there was no  
20 preliminary attempt to give any kind of notice  
21 whatsoever, has caused irreparable harm to the  
22 defendants. And the reason why it has caused  
23 irreparable harm to the defendants is that, first  
24 place, they were displaced as the manager of the hotel.

25 Second, their reputation has been harmed in  
26 the hotel community.

## Proceedings

1  
2 Third, that their trade secrets have been put  
3 in tremendous jeopardy by putting in a competitor of  
4 Marriott's, competitor as the person in charge of  
5 running the organization, it allows the competitor to  
6 have access to all of Marriott's secrets in terms of  
7 who they're trying to sell their rooms to, all the  
8 future sales that are going on, all their past sales,  
9 their current hotel guest lists. Everything that is  
10 proprietary interest of Marriott has been disturbed by  
11 the actions that Waikiki undertook.

12 The equities also favor Marriott. The  
13 argument that this is an agency relationship, so well  
14 put forward by Mr. Renard on behalf of the Waikiki --  
15 and I have to commend him, certainly excellent attorney  
16 -- are counteracted by the expressed agreement in a  
17 contract that was entered into -- I assume between two  
18 very sophisticated business people, with the help of, I  
19 assume, excellent attorneys on both sides -- with I'm  
20 sure a very careful deliberation as to the terms of  
21 this contract, that this contract was entered into  
22 where expressed provisions were made that Waikiki would  
23 not, would not invoke the issue of agency relationship  
24 at any time in any argument if they tried to displace  
25 Marriott. The agency issue was removed by contractual  
26 agreement between the parties.

## Proceedings

1  
2 Third, another point is, is third, the parties  
3 had entered into a very specific mechanism on how to  
4 terminate this agreement. And the most important part  
5 of this specific outline about how to terminate this  
6 agreement was the statement made in the contract that  
7 the two parties freely entered into, that the only way  
8 that you could terminate this agreement was to come to  
9 Court and get judicially determined by a Court in New  
10 York State as to whether or not the agreement should be  
11 terminated.

12 The fact that -- which, in fact, Waikiki began  
13 doing, by bringing the complaint and summoning Marriott  
14 to this courthouse.

15 But, instead of allowing a judge to  
16 judicially determine whether or not the agreement  
17 should be terminated or not, Waikiki then went forward  
18 and took it upon themselves to achieve the final remedy  
19 by, by self-helping themselves and throwing Marriott  
20 out. That was a direct contradiction of the mechanism  
21 that was set up between the parties as to the ways of  
22 going about to terminate this agreement.

23 Indeed, because of the way the contract is  
24 written, the Court finds that the -- that first place,  
25 the balance of the equities go in favor of the  
26 Marriott; that the possibility of ultimate success also

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1 weigh heavily in terms of Marriott -- although, of  
2 course I have not heard the final case in this matter  
3 -- but the possibility that the statements made in the  
4 contract might, indeed, go to Marriott's argument that,  
5 indeed, they have protection under the contract to such  
6 a way that they cannot be disturbed by just unilateral  
7 actions.  
8

9 Mr. Renard's argument that the agency  
10 relationship overrides anything to do with the  
11 contract, I think is clearly answered in language in  
12 the contract, in which both parties agreed, where it  
13 said, says at 11.03 at page 44 of the contract:

14 "Neither this agreement nor any agreements,  
15 instruments, documents, or transactions contemplated  
16 hereby, shall in any respect be interpreted, deemed or  
17 construed as making manager a partner, joint venturer  
18 with, or agent of, the owner."

19 "Owner and manager agree that neither party  
20 will make any contrary assertions, claim or  
21 counterclaim in any action, suit, expert resolution  
22 pursuant to Section 11.20, arbitration or any other  
23 legal proceeding involving the owner and the manager."

24 That forbids the agency argument.

25 Now, Mr. Renard goes on to tell me, well, but  
26 that doesn't matter. That doesn't matter, because it's



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1  
2 still an agency relationship; but I believe that,  
3 indeed, you can, if you so wish, contract away any  
4 agency relationship in a valid contract.

5 And so, therefore, the arguments made by  
6 Waikiki is a direct contradiction of the argument  
7 that -- of the agreement that was freely and openly  
8 entered into by the parties in the contract, in the  
9 agreement that set forth their relationship.

10 The Court, also, finds that there were  
11 other -- I don't think I have to reach each and  
12 everything -- but, also, wants to point out that the  
13 issue about the remedies of 9.02 of the contract, it's  
14 remedy is 9.02(A)(iii), it says that in order to  
15 terminate this agreement, the Court -- the parties have  
16 to come to Court and get a judicial resolution.

17 Which is, as I stated just a few seconds ago,  
18 indeed, Waikiki LLC has begun that process. But  
19 instead of waiting or even coming to Court saying  
20 there's an emergency, Judge, there's an emergency that  
21 we need to have this issue resolved immediately;  
22 instead of doing that by appropriate means, which would  
23 have been by order to show cause, they just went in at  
24 two o'clock on Sunday morning to, indeed, self-help  
25 themselves to the final resolution.

26 And, as such, not only are they in breach of

## Proceedings

1  
2 the agreement and in breach of their specific statement  
3 that their disagreements will be resolved by a judicial  
4 court, their actions have caused, as I stated a second  
5 ago, irreparable harm to the defendants, Marriott Hotel  
6 Services, Inc., I.S. International LLC, and Mr.  
7 Schrager, himself, Ian Schrager.

8 And so, therefore, the Court is going to grant  
9 for the reasons already stated a temporary restraining  
10 order; and I'm going to order that, indeed, as part of  
11 this temporary restraining order that the Marriott be  
12 restored to the hotel as its manager with full duties  
13 and full -- the panoply of everything that is stated in  
14 the agreement until a preliminary injunction hearing is  
15 held and a final resolution of this matter is  
16 determined. Because the Court is not ruling on the  
17 ultimate merits, but the Court is ruling on the order  
18 to show cause for a TRO.

19 And in terms of the preliminary injunction  
20 hearing, we can be off the record right now.

21 (Whereupon, a discussion was then held off the  
22 record.)

23 THE COURT: Let me ask you a question. In  
24 terms of your estimate amount of time you're going to  
25 need to present your various arguments in the  
26 preliminary injunction hearing, what is your estimate?

## Proceedings

1  
2 Do you think can you get it done in a day, or do you  
3 think you have too many witnesses for a day? Do you  
4 need two days? What is your estimate?

5 MR. RENARD: Your Honor, if the Court would  
6 indulge us, it's probably a question we could answer  
7 today, but I'm not sure right now. It depends, for  
8 instance, if you'd be interested in live witnesses or  
9 you just want testimony by affidavit; but I wouldn't  
10 mind conferring with clients and co-counsel.

11 THE COURT: All right, so let's give it a day.  
12 All right, let's give it Wednesday, so that we would  
13 just delay it one day, the beginning of the Harch trial  
14 and that means it's going to go -- who knows. That  
15 trial is taking up ten days of my life, but we'll put  
16 it over one day.

17 I'd like you to meet and confer about exactly  
18 who you're going to be -- how you're going to be  
19 presenting it.

20 MR. RENARD: Your Honor, we'll do that at the  
21 appropriate time. I just have some questions about the  
22 form of the order that the Marriott has presented.

23 First of all, your Honor, as the Court well  
24 knows, any injunction, including the TRO, has the  
25 possibility of contempt of court for its violation even  
26 if it's an inadvertent violation. And, your Honor, a

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couple of things about that.

Number one, as you well know, because we've described it to you, we have another company in there presently executing contracts, new vendor relationships, employees, signage, computer systems, all of that. Is there a timeframe that we can put on --

THE COURT: Yes, the same timeframe that you gave Marriott. Since we're going to think about it as eight hours ahead of us, we've got right now we're practically at eight o'clock at night. So I tell you what, since two o'clock in the morning there was that transfer, you have till two o'clock Thursday morning, right?

MR. HANDZO: Your Honor, it goes the other way.

MR. DeSANCTIS: It's five o'clock in the morning there.

THE COURT: All right, so we're already three o'clock on Wednesday morning, am I correct?

MR. WEINER: Three a.m..

MR. DeSANCTIS: They're six hours behind us. It's 5:20 a.m..

THE COURT: It's 5:20 a.m. right now in Waikiki.

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MR. FISCHER: Sunrise.

MR. RENARD: So, your Honor, by five in the morning Thursday morning?

THE COURT: No, I really don't -- I really want it to be quicker than that. I really honestly want the transfer back, to be done in what I would consider to be reasonable in six hours. Because why I'm saying something so quick is that, indeed, that is exactly what happened in the Marriott; and since now I've learned that transfers are easily done by just transferring the security personnel and stepping into the major desks that they have at the hotel, the signage should come down and the Marriott signage I hope hasn't been destroyed can go up and we can get going with this TRO right away.

MR. RENARD: Your Honor, second point. And there's a reference in the paragraph to we must undo the harm and damage that resulted from owner's purported ouster of Marriott.

I don't think, your Honor, that that would meet muster in terms of a definitive obligation. That could amount to so much satellite litigation and disputes back and forth. I'm not sure it's needed.

MR. HANDZO: Your Honor, may I just address this, because I think Mr. Renard is not reading that

## Proceedings

correctly or it's not the way we intended it.

What we meant is they should not interfere with Marriott's attempts to undo the damage. We're not asking them to do something affirmatively. We're just asking them to stay out of the way.

MR. RENARD: I'm not sure what that means when you're talking about someone who's operating in our hotel. It is so vague, is my point, what's there --

THE COURT: No, what's going to happen is Marriott is going to go back into the hotel and, also, is asking for Marriott's ability to undo the harm and damage that resulted from the owner's purported ouster of Marriott.

So, I would think that that would mean another press release going out the same way as Waikiki put out a press release saying that we have put in new people there. We ousted Marriott for good reason. Marriott upon their return to the hotel, will probably put out a press release equal to that.

I would make sure that it's equal, not more; and I, also, would make sure that the, that the relationships with the press, particularly in the internal press. We're not talking the New York Times. We're talking the hotel management press situation. That's what I'm talking about. Whatever belongs there,

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et cetera, et cetera.

I would wish that, indeed, accusations don't go forth. I would wish it to be very kind of like neutral in that sense, because we don't know the final outcome of this.

So, it's just, it's really a statement that Marriott is reinstated as Waikiki's manager pursuant to the agreement. And that really in the grand or extent of things could be what it should be.

MR. RENARD: Your Honor, third point, if I may. Because we have a reinstatement by a TRO, and this raises the problem I mentioned earlier. That makes them the manager until there's some court order saying they're not the manager.

THE COURT: As it says in the agreement.

MR. RENARD: I understand, your Honor. I'm not -- all I'm saying is that I'm not sure what is to be accomplished at a preliminary injunction stage, because it seems then incumbent upon us -- I know I'm talking out loud -- to come to the Court with some motion saying throwing them off, because essentially they have changed the status quo. They're back in, and it's not then as if losing at a preliminary injunction stage necessarily means they're out.

And my problem with that is -- you've heard

## Proceedings

1  
2 the argument, I think it's final relief; but  
3 respectfully, apart from that, I think we need a bond  
4 or undertaking here, your Honor, because 6313 of the  
5 CPLR provides for potential of a bond and certainly --

6 THE COURT: Let me just say this.

7 If you agree that this particular argument  
8 that we've had now for a series of hours and my  
9 decision to grant the TRO; if you agree that, indeed,  
10 this TRO will be in the same nature as a preliminary  
11 injunction and that we will not go to a preliminary  
12 injunction hearing, but rather that this will remain in  
13 full force until it is properly litigated -- I'll grant  
14 you, I will do my best to make this an expedited  
15 undertaking on the part of the Court -- then, you're  
16 entitled to a bond. Because then, they will remain --  
17 they being Marriott, the defendants -- will remain at  
18 the place, at the hotel until there is a new  
19 determination by the Court one way or the other.

20 And, so, if that is a preliminary injunction,  
21 then we don't need to go to a hearing and, indeed, then  
22 you're entitled to a bond because you may have been  
23 hurt, and the bond has to be commensurate with that. I  
24 have to think about that for a second or two, but I'll  
25 hear people on the bond.

26 First place, would you be agreeable that this



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is transformed into a preliminary injunction?

MR. HANDZO: I believe so, your Honor. I'm just trying to think on my feet, something I don't always do very well; but, yes. I mean, if we want to do this as a preliminary injunction and do it expedited, we will do that as quickly as we can.

On the bond, let me just say that I don't think a bond should be required because, essentially, we're -- now, we're just getting back to where we should have been, where we were Sunday morning.

I mean, we're now in a position where they're saying we have to post a bond because they did something they shouldn't have done. It doesn't really make a lot of sense to require us to post a bond under those circumstances, and I think it's safe to say that Marriott is good for whatever damages could be assessed in this case.

MR. RENARD: Your Honor, if it's a preliminary injunction, certainly an undertaking is required; and we can argue the merits, but the standard there is enough to cover the potential damages if in fact it's ultimately determined that the TRO or if we convert to a preliminary injunction should not have been granted. I mean, that's the standard, and those damages are considerable; but if we can do this, your Honor,

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perhaps this, too, is something we can inform the Court very quickly, whether we have an agreement to convert this to a preliminary injunction.

THE COURT: Right. Otherwise, we're still under the TRO.

MR. WEINER: I think, as your Honor knows, the bonds typically set by this Court are not set at a very high amount, unless there is an actual showing of what the damage is. And I've reviewed the affidavits and they have not made an actual showing of any real immediate economic injury; and I think in order for you to give a high bond, you would have to have that information before you.

MR. RENARD: Well, we have Mr. --

MR. WEINER: The affidavit you submit simply says they spent a lot of money on the property. Doesn't say operating losses, those losses being incurred by Marriott. There has to be some real showing of out-of-pocket, actual out-of-pocket loss that will occur as a result from the injunction.

MR. RENARD: Marriott is not making our debt service, your Honor. We've been declared in default just this past week.

THE COURT: Wait one second. I am not going to get into that, and you're not going to have a bond

## Proceedings

1  
2 equal to debt services. The only kind of bond that you  
3 could possibly ask this Court for is the kind of bond  
4 that if, indeed, there was -- and I think, I think  
5 that, indeed, it's well pointed out -- that in this  
6 case, all we're doing is restoring the status quo ante  
7 from really what was illegal actions done by your  
8 client.

9 And, so, therefore, whether or not this  
10 actually has the same quality as having the need to  
11 have a bond, I'm not so sure. And if I, indeed, I do  
12 go with the CPLR and grant a bond, it's going to be  
13 something much more reasonable, because the issue is  
14 not the ultimate damages. That we're going to have to  
15 litigate. But, rather, that during this interim period  
16 that, indeed, the Marriott is restored as the manager  
17 pursuant to the contract.

18 So, with that, and maybe that's something you  
19 could meet and confer on. I think that this should be  
20 transferred into a preliminary injunction. I think  
21 that you should have a bond, but you can give me  
22 respective letters I think the bond should be  
23 \$5 million, or I think the bond should be \$20, and I'll  
24 take it under consideration.

25 All right, I can have letters from everyone.

26 MR. RENARD: So, your Honor, we will let the

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1  
2 Court know later today, certainly, whether we're in  
3 agreement and we'll confer. If we are, we'll confer  
4 with Mr. Handzo; and if we have an agreement, we can  
5 then present that to your Honor.

6 THE COURT: Good.

7 MR. HANDZO: Your Honor, may I just hand up an  
8 order to the Court? It's a little different than the  
9 one we filed with our papers. That's been presented to  
10 Mr. Renard. And if I can hand it up, and I can point  
11 out where the one change that was made. There was one  
12 paragraph added, Paragraph 3, on page 2.

13 (Handed up to the Court.)

14 THE COURT: First place, have you seen this?

15 MR. RENARD: Mr. Handzo did hand it to me,  
16 your Honor, before the hearing today.

17 THE COURT: Which one am I looking at?

18 MR. HANDZO: It should be the same, your  
19 Honor. There's two copies of the same thing.

20 THE COURT: Paragraph 3?

21 MR. HANDZO: On page 2, you'll see a  
22 Subparagraph 3.

23 THE COURT: Right.

24 MR. HANDZO: And that is what we added,  
25 addressing --

26 THE COURT: The potential theft of property.

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MR. HANDZO: Right.

THE COURT: I do not see a problem with that, sir.

I think that that actually is one of the reasons that the TRO is being granted, and that is of all the potential harm done to the Marriott, in addition to name and recognition and reputation, is the issue of the proprietary confidential information that was on the property when it was so abruptly taken over by your new managing agent.

So, with that, I think that I have to grant that.

MR. RENARD: Your Honor, can we also have -- I'm not sure how we resolved it in terms of the time to make sure we don't have a dispute in terms of the actual transition in order to comply with all this. Can we have that delineated within the order?

THE COURT: I think it can be delineated. I think that's a good thing. I think we can add another paragraph.

Let me just -- and I suggest you may want to confer on this, another paragraph saying something along the lines of the Marriott will return to its managing capacity on or about whatever time and date, which you'll calculate, because don't ask me to.

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I may get it a couple years wrong. I'm not very good at these things.

So, anyway, I suggest you do add that. So I'm going to give it back to you.

(Handed back)

MR. WEINER: Your Honor, I think that simply would be 2:30 p.m. Hawaii time using the difference in times. Six hours from now, well, three o'clock, but --

THE COURT: Okay, 3:30.

MR. WEINER: 3:30.

THE COURT: That would be sort of a good time, because I understand all good hotel transitions should happen around two o'clock in the morning.

MR. WEINER: That would be in the afternoon.

MR. RENARD: He said p.m. so maybe people are at the beach at that time. I'm not sure.

MR. WEINER: They won't be in the hotel, so.

THE COURT: If it's done appropriately, there will be no knowledge of any guests that anything has happened, and I'm sure it will be done appropriately.

MR. RENARD: Your Honor, if we do decide to agree to convert this to a preliminary injunction, we'll need then to address the bond at some point.

THE COURT: Yes, what you'll do is you'll put down the language in an agreed-upon order. You'll

## Proceedings

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2 leave blank, and then let me have it in writing, your  
3 views of what it should be; and, remember, reasonable,  
4 you know, is a good idea, and then I'll have his views  
5 and I will make a decision.

6 MR. HANDZO: Your Honor, if I may hand this  
7 up. We've agreed on the language to be delineated.

8 THE COURT: All right.

9 (Handed up to the Court.)

10 MR. RENARD: Just so I play my role  
11 appropriately, that's agreed to in form, but not in  
12 substance, I think they say.

13 THE COURT: Well, service I think is not  
14 needed because it's already handed in court. Okay?

15 MR. RENARD: Yes.

16 MR. HANDZO: Yes.

17 THE COURT: So that's taken care of.

18 All right, I have -- I'm putting down  
19 September 7, 9:30 in the morning. That will be for the  
20 preliminary injunction hearing, unless we can come to  
21 the other resolution that we talked about because I do  
22 think that that's a better resolution.

23 Now, my question is, I do think I have  
24 everybody's papers in hand already. I don't think I  
25 need anything new for a preliminary injunction hearing,  
26 but do you think that you want --

## Proceedings

1  
2 MR. RENARD: Your Honor, we'll certainly -- I  
3 mean, it was a middle of the night to get that brief  
4 done, which isn't nearly a full explanation of our  
5 position; and the affidavits, as well, it's what we  
6 could get together in the time we had. So we  
7 definitely would like an opportunity to say by Monday,  
8 to put in --

9 THE COURT: Well, Monday is a holiday. I  
10 realize that you're not going to be involved in  
11 holidays; but, nevertheless, I do think if we get it by  
12 the 6th, I'll have a chance to read it. But, please,  
13 get it to me no later than one o'clock on the 6th or  
14 actually 12:30 that way I can begin reading it over  
15 lunch.

16 So, again, if that's true, if you can give, in  
17 a sense, rolling copies so that they know what you're  
18 doing, maybe a preliminary preliminary, and that way if  
19 you want to do a reply, you can do so.

20 MR. HANDZO: Yes, I was just going to suggest  
21 that that may be one of the things that Mr. Renard and  
22 I should just confer about and come up with a schedule  
23 for both sides to commit anything extra that they want  
24 to submit.

25 THE COURT: Right.

26 MR. WEINER: Your Honor, I think defendants



## Proceedings

1  
2 may want to put a supplemental brief in because they  
3 raised new authorities in their brief.

4 THE COURT: Well, that's what I mean, about --  
5 it's going to be a very expedited event, all right.  
6 And I think it's only right that if I do a preliminary  
7 injunction hearing, I do it an expedited manner because  
8 I think that we'll hear a lot of what we already did.  
9 But, nevertheless, it may be new issues that I have to  
10 consider, and I don't want to in any way prohibit a  
11 proper briefing.

12 So, if you tell me there's another way of  
13 handling it and that is, that if you tell me I don't  
14 want to do it on the 7th, but we'd like to do it in a  
15 couple weeks from now, you know, et cetera, I am  
16 occupied -- if I start this trial, I'm occupied all of  
17 that week and all of the following week. It's supposed  
18 to end on that Friday, September 16th.

19 I know I'm not in court, I'm at conference on  
20 the 19th, 20th and 21st.

21 So, now you're facing that kind of deadline.  
22 I won't interrupt the trial once I start it. I'll put  
23 over the beginning of the trial; but, otherwise, I have  
24 to go beyond it. So all of that should be a part of  
25 your consideration.

26 Signed and sealed. All right, I want to thank

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you, again, for certainly very interesting arguments.

MR. HANDZO: Thank you, your Honor.

MR. RENARD: Thank you.

- - - -

CERTIFIED TO BE A TRUE  
AND CORRECT TRANSCRIPT

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BONNIE PICCIRILLO  
OFFICIAL COURT REPORTER

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2 SUPREME COURT OF THE STATE OF NEW YORK  
3 COUNTY OF NEW YORK: TRIAL TERM PART 3  
4 - - - - - X  
5 M WAIKIKI LLC,  
6 Plaintiff,  
7 - against - INDEX NO.  
8 651457/11  
9 MARRIOTT HOTEL SERVICES, INC.,  
10 I.S. INTERNATIONAL, LLC and IAN SCHRAGER,  
11 Defendant.  
12 - - - - - X  
13 MARRIOTT HOTEL SERVICES, INC.,  
14 Counterclaim-Plaintiff,  
15 - against -  
16 M WAIKIKI LLC,  
17 Counterclaim-Defendant.  
18 - - - - - X  
19 60 Centre Street  
20 New York, New York  
21 August 31, 2011  
22 PROCEEDINGS  
23  
24 BEFORE:  
25 HONORABLE EILEEN BRANSTEN,  
26 Justice  
27  
28 APPEARANCES:  
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(Recall)

THE COURT: Present is Mr. DeSanctis and Mr. Fischer. On telephone is Mr. Renard.

THE COURT: Okay, Mr. Renard?

MR. RENARD: Yes, your Honor.

THE COURT: How are you?

MR. RENARD: Fine.

THE COURT: I have before me, I have Mr. DeSanctis.

MR. DeSANCTIS: That's right.

THE COURT: And Mr. Fischer.

MR. FISCHER: Correct. Thank you, your Honor.

THE COURT: Since we're going to be on the telephone, you can come to the front of the table.

Mr. Renard, what's going on?

MR. RENARD: Your Honor, when I got back to the office here on phone calls, obviously, with respect to the order in moving to get the order complied with, I got an e-mail from Mr. DeSanctis saying that, Our folks showed up today or this morning and were told that he couldn't come in and, your Honor, I was unaware of that; but I wasn't even sure what he meant by his folks and what the intention was.

Our head client representative, Mr. Damien McKinney, and the present general manager of the hotel

1  
2 with the Aqua group reached out to Mr. Rock, who was  
3 the general manager of Marriott when the hotel was an  
4 Edition and offered to meet at noon with the high-level  
5 representatives so they could get a game plan for the  
6 transition at 2:30. And I've told this to  
7 Mr. DeSanctis now twice, and he's suggesting there's  
8 some bad faith going on here.

9 Your Honor, that's the reason that I asked for  
10 a specific time so we wouldn't get into these  
11 accusations and finger pointing of, well, you haven't  
12 done this by a certain time or you haven't done that by  
13 a certain time. There is a lot that went on this  
14 morning before we could even get a position to meet  
15 with Marriott with respect to this. That's why they  
16 offered to meet at noon.

17 I don't even know whether or not Marriott has  
18 accepted that offer for a noon meeting in Hawaii with  
19 the executive committee to discuss the transition  
20 issues; but, your Honor, that's where we stand. We  
21 have a 2:30 transition time --

22 THE COURT: Which is 8:30 p.m.

23 MR. RENARD: I should be clear about my times.  
24 Yes, your Honor, that's 8:30 p.m. our time. And a  
25 meeting two and a half hours before that which is what,  
26 six, so in two hours, among the executive committees to



1  
2 talk about transition issues. Your Honor, again,  
3 that's why I thought it prudent to even have a  
4 timeframe so we wouldn't be where we are now.

5 THE COURT: Mr. Renard, just one second, all  
6 right.

7 MR. RENARD: Sure.

8 THE COURT: All right. Mr. DeSanctis, what is  
9 going on? You're next, why are you here?

10 MR. DeSANCTIS: Sure, and I'm sorry to be  
11 bothering, your Honor. I really am.

12 THE COURT: Speak up so he hear.

13 MR. DeSANCTIS: Sure. I'm sorry to be  
14 bothering your Honor. When we left the court, the  
15 small core management team for the hotel out in Hawaii,  
16 which is six people, went to the hotel to begin an  
17 orderly transition. They were met with literally lines  
18 of security guards who, as we speak, still are  
19 physically preventing them from getting too close to  
20 the building.

21 THE COURT: Okay, wait a second. We have here  
22 that, ordered that the Marriott shall be allowed to  
23 return to its management role at its hotel by 2:30 p.m.  
24 in Hawaii time.

25 Would it have been nicer that at -- I'm so  
26 good at these times -- that at our time, four o'clock

1  
2 or three o'clock or two o'clock our time, they would  
3 immediately open the doors to the Marriott people? The  
4 answer is, of course, it would have been nice, but they  
5 didn't; and they're not in violation of this order  
6 until 2:30 p.m..

7 And at that point, in Hawaii time -- so,  
8 8:30 p.m. eastern standard time. We can't presume it's  
9 not going to happen. That's something that, because we  
10 don't know what's going to happen, I don't really know  
11 what's going to happen ten minutes from now. Who  
12 knows. I may not be around. It would be good for Mr.  
13 Renard.

14 MR. RENARD: Not at all, your Honor.

15 THE COURT: Anyway, I just don't know. What  
16 I'm saying to you is this. That you have to let things  
17 play out. Mr. Renard tells me, look, we tried to do an  
18 orderly transition. We want to have a meeting with the  
19 executives and everything else two hours before the  
20 time becomes. So noon, that would be at sixth,  
21 six-thirty this afternoon. That's reasonable in my  
22 book, all right.

23 MR. DeSANCTIS: I understand. My concern is  
24 this: First of all, we've gotten reports from the  
25 property that people are frantically boxing up  
26 documents back in the accounting offices. Now, perhaps

1  
2 it's their documents, but we're very concerned about  
3 that. And your Honor gave, essentially, a six and a  
4 half hour smooth transition time, and they're sort of  
5 running out the clock, not even talking to our people  
6 on the ground until only two and a half hours remain.

7 And by that time, your Honor is off the bench  
8 at 6:00 p.m. here, and I'm just very concerned that we  
9 haven't seen enough from them to -- for us to have  
10 assurances that this six and a half transition period  
11 is actually going to be put to good use.

12 THE COURT: Well, look. Again, I can't  
13 presume anything. I happen to be a judge. I am a  
14 judge 24/7, all right. I may not be here, but I'm  
15 still available. In fact, people have always been able  
16 to find me before, if necessary.

17 I don't want to be presuming that I am going  
18 to have to sign a motion to hold the plaintiffs in  
19 contempt. I don't presume that. I'm of the other  
20 mind. I am of a mind that people obey court orders,  
21 and I think that Mr. Renard is definitively in good  
22 faith, and I'm sure that he's giving very good advice  
23 to his clients.

24 MR. RENARD: Your Honor, if I may along those  
25 lines, and the Court, I think, you hit upon it, can  
26 safely presume that as good lawyers, we're trying to

1  
2 give the best advice to our client. And in that  
3 interest, your Honor, of good faith and fair  
4 disclosure, you know, unfortunately, potential  
5 bankruptcy is something that has to be considered here.

6 But I will say this, short of that drastic  
7 action -- and I have no idea whether that will come,  
8 although, it would have to come very quickly. You  
9 know, we intend to comply with the Court's order,  
10 because, obviously, we have to. And if the client,  
11 ultimately, determines to avail himself a bankruptcy  
12 protection, that will have to happen quickly; or else,  
13 you know, the transition will take place as it's  
14 presently scheduled, and I don't know for sure.

15 THE COURT: All right, well, that's  
16 interesting. I mean, there's always -- I thought that  
17 your first move was to get your subway token out and go  
18 up to Madison Avenue. That's where I thought you were  
19 going; but, obviously, you didn't. You decided to go  
20 downtown instead.

21 MR. RENARD: You know, TROs are not  
22 appealable. Believe me, any seeking energy of your  
23 Honor's -- you know, again, the time you spent today  
24 and but, sure, we considered and evaluated all things  
25 as we are now. But, you know, short of something like  
26 a bankruptcy, you know, there will be that conversion

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at 2:30.

THE COURT: All right, so with that, Hawaii time.

MR. RENARD: Yes, thank you. Close to one hour -- or about one and a half hours -- no, it's four and a half hours from now.

THE COURT: All right, look, Mr. DeSanctis, I'm glad that you're concerned. Indeed, you probably picked up a little piece of information just then, that maybe it would concern you. If I were you, it would concern me.

MR. DeSANCTIS: It does.

THE COURT: But that's the scheme of things. I mean, it's a very complicated issue here, and all I can tell you is that you have to let it at least play out in terms of the time.

And if, indeed, as you suspect or you fear it doesn't turn out the way you hope it will, then you do have remedy and you have to get on the remedy as quickly as possible.

If, on the other hand, as Mr. Renard has intimated, there is a filing of the bankruptcy; then remedy is not with me. Because there's an absolute stay, and I couldn't give you remedy. So, we shall see what happens, but all this is very interesting.

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2 MR. RENARD: Thank you, your Honor. I'll get  
3 back on the telephone lines again.

4 MR. DeSANCTIS: If I could ask for some  
5 clarification, if possible.

6 It sounds like absent the bankruptcy filing,  
7 we have a commitment that we will be let in by 2:30?

8 THE COURT: Mr. DeSanctis, you have the signed  
9 order. You're not getting a commitment from Mr. Renard  
10 that everything is going to go well. I mean, he has a  
11 job of making sure that all the way over in Hawaii that  
12 they understand that this order is a very important  
13 order, and that it came as a result of a very vigorous  
14 and lengthy argument. And so that's his job, to try to  
15 make sure that, indeed, this order is carried out as  
16 it's supposed to be.

17 There's no assurances that can be given. All  
18 I can tell you is that the order is signed; and if,  
19 indeed, the plaintiff M Waikiki LLC does not abide by  
20 this order, then there is the next steps, and, you  
21 know, again, as far as I know, I'm not going anywhere.  
22 So I shall be here.

23 Now, what are the next steps? Obviously, it's  
24 to hold somebody in contempt if they don't obey the  
25 order, and that has to be dealt with in it's own  
26 inimical way. You have to make sure it's done right,

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and you have to personally serve and all the other things that happen. But, let's not presume.

Instead, let's dream of positively that everything will go well. All right?

MR. DeSANCTIS: I'm a fan of positive thinking.

THE COURT: Okay.

MR. RENARD: Same on this end, your Honor.

THE COURT: All right, so, that's it. This was on the record, again. So, Ms. Piccirillo is available for new transcription.

MR. RENARD: The third. All right, thank you, your Honor.

THE COURT: All right, goodbye.

MR. RENARD: Goodbye.

THE COURT: All right.

MR. DeSANCTIS: Thank you, your Honor.

MR. FISCHER: Thank you.

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OFFICIAL COURT REPORTER